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WISCONSIN REPORTS

119

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

SEPTEMBER 8 — DECEMBER 11, 1903.

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

JOHN B. CASSODAY,
Ex officio CHIEF JUSTICE.
JOHN B. WINSLOW,
ROUJET D. MARSHALL,
JOSHUA ERIC DODGE,
ROBERT G. SIEBECKER.

Attorney General, - L. M. STURDEVANT,

Clerk, - - - CLARENCE KELLOGG.

ERRORS NOTED IN PREVIOUS VOLUMES.

VOL. 118.

Page 395, lines 12, 13. For *Crist v. Davidson*, 116 Wis. 532, read *Christ v. Davidson*, 116 Wis. 621.

Page 503, lines 5, 6. For 106 Wis. 365, read 108 Wis. 365.

Same corrections in table of cases cited.

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IN MEMORIAM.

ORSAMUS COLE.

On the 7th day of September, 1903, Mr. F. C. Winkler of Milwaukee, on behalf of the Wisconsin State Bar Association, presented the following memorial of the late Chief Justice ORSAMUS COLE, and moved that it be spread upon the records of this court:

Memorial of the State Bar Association.

May it please the Court:—A tribute to the memory of the late Chief Justice COLE should be a record of his life and services; not words of eulogy. The truthful record speaks its own encomium.

ORSAMUS COLE was born at Cazenovia in the state of New York on the 23d of August, 1819. His ancestry was English. His grandfathers, both on his father's and his mother's side, served in the Revolutionary army. He was brought up on a farm, and in early life became thoroughly inured to hard work. While he was very vigorous physically, his inclinations were towards study and he succeeded in gaining the opportunity of a liberal education. He graduated from Union College at Schenectady in 1843. He had already given portions of his time to legal studies. To these he now applied himself with such diligence that, although he was for a time occupied in teaching, he qualified himself for the profession in less than two years of time.

In 1845 he found his way to the new Northwest. After a short sojourn in Chicago he came to Potosi, then a thriving and prosperous town in southwestern Wisconsin. Here he commenced his professional career and with marked success. Two years later he was elected a representative to the convention which framed the constitution of his state. Here he showed the patient, painstaking ability which has characterized the work of all his life. One who attended that convention as a reporter has said: "At the close of the session but few men stood higher in the estimation of their fellows than did ORSAMUS COLE." That this must be true is proven by the fact that in the next year, 1848, without his knowledge, without a thought of candidacy on his part, he was nominated for

representative in Congress by his district. He accepted the nomination, entered upon the canvass with energy and spirit, and was triumphantly elected. Thus he became a member of the Thirty-first Congress; that memorable Congress at whose hands the towering genius and patriotic devotion of Henry Clay won the compromise measures of 1850, which it was hoped and fondly believed would save and hold the peace of the Union. Mr. COLE was a Whig and he was young. He certainly did not lack in admiration for the great leader of his party; nor can he have been insensible to the extraordinary charm of his personality. But Mr. COLE was of the free soil; his antipathy to slavery was stronger than his love for Henry Clay—he could not vote for the Fugitive Slave Law.

Mr. COLE had little taste for political life, and at the end of his term retired from Congress and resumed the practice of his profession. In 1853 he was the candidate of his party, then in the minority, for attorney general of the state. In the early days of 1855 an event which shaped his life took place. A judge of the supreme court of the state was to be elected on the first Tuesday of the coming April. Under date of February 19, 1855, a communication signed by forty-five members of the legislature was presented to him, calling upon him to allow his name to be used as an independent candidate for associate justice. Like his nomination for Congress six years before, this call came to him unsolicited and without knowledge on his part. With some hesitation he accepted, and he was elected. At the opening of the June term, 1855, he took his seat upon the bench with EDWARD V. WHITON, Chief Justice, and ABRAM D. SMITH, his senior associate. He was re-elected in 1861, 1867, 1873, and 1879. On the 11th of November, 1880, he was appointed chief justice to succeed Chief JUSTICE RYAN, who had died the month before. The following spring he was elected chief justice both to fill the small remnant of the unexpired term and for a new term of ten years, beginning the first Monday of January, 1882. He served to the end of this term, January 4, 1892. Thus, from the beginning of June, 1855, until the close of 1891, for a period of thirty-six years and seven months, he held a place upon this bench. During that long period it may be truly said, he lived for that bench. He brought to the discharge of his judicial duties absolute singleness of devotion. No thought of ambition, wealth, or personal enjoyment allured him or swerved him for one moment from the quiet, patient, delving labor of critical investigation of law and fact, and of careful, conscientious thought to bring to the solution of every question, according to his best lights, the principles of law and justice.

Beginning with Vol. 4 and ending in Vol. 81, Wisconsin Reports, contain the record of his judicial labors. Very few are the cases

in which he did not take part, and in no case in which he participated did he fail to make a close personal study of the facts and of the law involved.

Some of the cases which came before him were of supreme importance. The first was the famous case of *Attorney General vs. Barstow*, 4 Wis. 567. Looking back at this day, the question there decided seems simple enough. Perhaps it was so then. Yet it must be remembered that the controversy it presented was a contest of the giants of the bar of its day. The junior judge delivered a very able and well written opinion, showing how thoroughly he was grounded in the fundamental principles of our constitutional law. The decision made might be summarized in his own words:

"This is not only a popular government, but it is a representative government—one where the officers are but the *agents*, not *rulers*, of the people; one where no man is so high as to be above the constitution, and no one so low as to be beneath its protection."

Some years later the same Fugitive Slave Law which had aroused his opposition when a member of Congress came before him judicially in the supreme court. The primary question was as to its constitutionality; but with this came the more momentous question of the power of the state to hold it invalid against the federal authorities and contrary to the decision of the supreme court of the United States. In view of his own antecedents and all the circumstances of the case, it is not strange that Mr. Justice COLE acquiesced in and sustained the radical positions taken by Mr. Justice SMITH and supported by Chief Justice WHITON, although the general drift of his mind was unquestionably conservative.

In 1859 the personnel of the court changed. Chief Justice WHITON died and was succeeded by LUTHER S. DIXON. Mr. Justice SMITH'S term expired and BYRON PAINE took his place. The new judges were both men of very marked ability, and both were younger than Mr. COLE. Soon questions of the Civil War presented themselves; questions of the right to create a state debt, of the suspension of the writ of *habeas corpus*, of enlistments, enrolments, and the draft; all of great public interest and some of them of crucial importance, involving the powers of the government and its officers, both federal and state. It is not too much to say that the record of the supreme court upon these various questions is one which reflects high honor on the state of Wisconsin.

The state and its constitution being new, in their formative period so to speak, many other trying questions were necessarily encountered and required judicial adjustment. Questions of taxation were then, as they always are, vexed ones. The meaning of our constitution, requiring uniformity in the rule of taxation, as

applied to a number of legislative enactments, was challenged. On this subject Chief Justice DIXON and Mr. Justice PAINE took positions in which Justice COLE could not concur. A somewhat peculiar course of decisions took place in seeking to give effect to the views of the majority. At a later period the court returned to the views of Mr. Justice COLE, and evolved a logical and consistent rule of construction of which those views were the basis.

The limits of this memoir do not permit a reference to the many cases of importance and interest which occupied the attention of the court during the many years of Judge COLE's service.

That he was able, painstaking, and judicial needs scarcely to be mentioned. His nature was not combative. In manner he was quiet and unobtrusive. On argument he was closely attentive and seldom interrupted counsel with questions or suggestions. He formed his conclusions slowly upon full investigation and mature deliberation. He was mild of speech, but strong and firm in his convictions. Of cultured intellect, he was well read in the law and possessed an ample measure of legal acumen enlightened by a deep love of justice. He was kind and courteous to every one, affable in intercourse. With these qualities he became, not only a very valuable public servant in his exalted place, but a highly honored and universally loved and respected judge. In private life and as a citizen of the commonwealth he was exemplary; an honorable, independent, unobtrusive, genial man.

Upon the expiration of his term as chief justice he retired from public life and made his home with his only son in the city of Milwaukee. He had always loved and given many hours to the treasures of literature; the classics, history, philosophy, and poetry held his affections. To these he turned in the evening of life with redoubled zeal. He had always been a great walker, and for years kept up his vigor by long daily indulgence of this favorite exercise. After he had turned his eighty-second year he began to fail, and on the 5th day of May, 1903, he passed peacefully away. Upon the retrospect we can truly say, he has filled life's full measure nobly and well.

F. C. WINKLER,
WM. F. VILAS,
JOSHUA STARK,
P. A. ORTON,
CHARLES M. WEBB,
SAML. D. HASTINGS,
Committee.

GEORGE G. GREENE, President. CORNELIUS I. HARING, Secretary.

Orsamus Cole.

Judge George Clementson of Lancaster then addressed the court as follows:

May it please the Court:—Chief Justice COLE, from 1845 when he came to Wisconsin, to June, 1855, when he took his seat upon the bench of this court, resided in Potosi in Grant county. As a resident of that county I deem it not inappropriate to speak a few words of the distinguished dead on this occasion.

One who to-day should pass through the quiet village of Potosi, which sits in a narrow valley opening on to the Mississippi, could not fail to observe the evidences of its age and would be charmed by its quaintness and its picturesque location, but, if ignorant of its history, he would wonder why an ambitious young man, as was ORSAMUS COLE, a college graduate and a member of the bar, should journey from the East to engage there in the practice of his profession; or why that other young man, also college bred, eloquent of tongue, and of brilliant and comprehensive mind, should soon after come to Potosi and become the junior member of the law firm of Cole & Biddlecome. The wonder, however, would cease when it was told that beginning with 1825 a considerable population flowed into that part of our state that is now embraced in the counties of Iowa, Grant, and Lafayette, attracted thither by the lodes of lead ore that had recently been discovered in that part of the country; that by the census of the inhabitants of the territory of Wisconsin taken in 1836 it appeared that more than one third of the entire population within the region now comprising the state of Wisconsin were residents of Iowa county, which then included the territory now within the boundaries of the counties of Iowa, Grant, and Lafayette; and that the village of Potosi, now so quiet, was in those days a center of the mining industry and a busy mart of trade—a shipping point for lead and a distributing place for freight received by river for a considerable extent of country. The rush to the lead mine region in those days was similar to the exodus to California when gold was discovered there, though not so extensive. In the throng of both movements was a considerable proportion of young men of energy, learning, and ambition, anxious to take advantage of an opportunity that promised a successful career. Moved by this impulse we find in pre-statehood days among those who located in Iowa county such lawyers of ability as M. M. Cothren, Moses M. Strong, Samuel Crawford, Cadwalader C. Washburn, with Charles Dunn, the chief justice of the territory; and in Grant county, which was formed by an act of the first territorial legislature, which met at Belmont in 1839, among the members of the bar were ORSAMUS COLE, J. Allen Barber, Ben C. Eastman—all afterwards representatives in Congress from that congressional district—Nelson Dewey,

the first governor of the state, and Joseph T. Mills, the father of our Codé of procedure and for twelve years judge of the Fifth circuit. Most of these men took prominent part in the conduct of the affairs of the territory and in the organization of the state. Chief Justice COLE survived them all, and for a number of years before his death he was the sole living representative of the able territorial bar of Southwest Wisconsin. That in the contest with such able competitors ORSAMUS COLE should so soon after becoming a resident of the territory gain the prominent standing he did at the bar and in the estimation of the people speaks more forcibly than words of commendation can of the ability and character of the man. His success would at first impression appear all the more remarkable because he was wanting in some characteristics apparently essential to advancement in a free, easy, aggressive, rough and ready mining community. He was always a gentleman in conduct. He was not assertive, but modest and somewhat reserved. He was not an advocate. He had not the ready eloquence that captures a jury and in political contests wins the applause of the people. Biddlecome was the jury lawyer of the firm of Cole & Biddlecome. But every community, whether rough or polished, honors ability when joined with integrity, and when to these are added, as was true to a large degree in the case of the deceased chief justice, sound judgment and saving common sense, the man possessing these attributes will be given the confidence of his fellowmen and they will delight to honor him.

This was emphatically shown in the case of ORSAMUS COLE. Two years after coming to Wisconsin he was elected one of the five members from Grant county to the convention that met at Madison in December, 1847, to frame the constitution for the state of Wisconsin about to be born into the Union. In the fall of 1848, at the first general election held after Wisconsin became a state, he was elected to Congress. Two years after his term as member of Congress expired he was the candidate upon the Whig state ticket for attorney general, and less than two years thereafter he was nominated for associate judge of this court and elected over SAMUEL CRAWFORD, who had the prestige of already having a seat upon this bench. Of Chief Justice COLE it was literally true that in every instance it was the office that sought the man. That he was called upon by his district and the state within ten years after coming to Wisconsin to fill these several high offices is the strongest evidence of his worth and of its appreciation by the people. In June, 1855, at the age of thirty-six he removed to Madison to enter upon the important duties of a judge of this court. The people of his county were justly proud of his preferment, but lost him as a citizen with sincere regret. He left behind him none but friends. No

words but words of commendation were spoken of him. He had no enemy—no critic. Then, as he ever remained, he was a man without blemish and above reproach. I will not speak of his invaluable services for more than a generation as a member of this court. This was fittingly done in this presence ten years ago when his portrait, which here looks down upon us, was presented to the court, and others better qualified than I am speak of them to-day. I have been moved to address your Honors at this time briefly, and I am aware inadequately, because I felt that a word of tribute to the memory of the honored dead should be spoken by a member of the bar of the county of Grant—a county into which ORSAMUS COLE came, a young man and a stranger, where he rose to distinction, and which gave him up to take the seat which he so well filled in this high tribunal.

Mr. H. M. Lewis of Madison then said:

May it please the Court:—At a meeting of the Dane county bar, held at the court house in the city of Madison on the 6th day of May, A. D. 1903, a committee was appointed, consisting of E. W. Keyes, B. J. Stevens, J. H. Carpenter, F. J. Lamb, Burr W. Jones, J. M. Olin, and H. M. Lewis, to draft and present to this court a memorial expressive of their high esteem and veneration for the late chief justice, Honorable ORSAMUS COLE.

In behalf of said association, we submit the following:

Memorial of the Dane County Bar.

Judge COLE takes his place among that class of honored jurists distinguished for their long and faithful services in high judicial positions. During his nearly thirty-seven years of service upon this bench, a generation of lawyers passed away and there were few remaining to bid him adieu upon his voluntary retirement as a member of this court, who were present to greet his coming to it.

Judge COLE, when elected associate justice of this court, was young in years, with a limited experience as a lawyer, and when he first took his place upon the bench his modesty and unassuming manner was very noticeable, almost giving him the appearance of timidity, but it was soon apparent that he was independent and firm in sustaining his views as to the correct and rightful solution of the questions which came before the court for decision.

We will leave to others to speak of him as a jurist and as to his rank and place in the judicial history of the state, as we prefer to speak of him as a neighbor, fellow-citizen, and friend as we knew him. He was domestic in his tastes and habits, devoted to his family, a lover of good literature. He was seldom seen in public

gatherings or about our streets, and seemingly did not seek many acquaintances or intimate friends,—rather reserved in his manner, but easily approachable and, when spoken to either on business or as a matter of neighborly greeting, he was kindly in his manner, affable, and readily entered into conversation. He was a pleasant and agreeable companion and friend. But from his appearance of reserve, his devotion to the duties of his high office, and the infrequency of meeting him, although his face was well known to most of the residents of this city, yet it is an undoubted fact, notwithstanding his long residence here and the conspicuous position he occupied during the entire time, there were comparatively few of our citizens who felt that they had a personal acquaintance with him.

This absence on his part of any attempt or desire to extend his acquaintance, to ingratiate himself in the hearts of the people, to become popular, makes more remarkable his success during his entire life in this state in winning the suffrages and support of his fellow-citizens.

They recognized in him a man of unswerving integrity, who would intelligently, conscientiously, and with fidelity perform the duties imposed upon him by them. They knew he could be trusted. From the time he was elected an associate justice of this court, he seemed to have no other interests, desires, or ambitions than to faithfully and to the best of his ability perform the duties pertaining to his office. His example is worthy of emulation by all public servants.

After a long and distinguished career he went to his grave without a stain or blot to mar his high and exalted character. We esteemed him living,—we mourn him dead.

On behalf of the court Mr. Chief Justice CASSODAY responded as follows:

My personal acquaintance with the distinguished gentleman of whom you speak commenced when I was admitted to the bar of this court, forty-four years ago the 7th day of last February. The court at that time was held in the basement of the west wing of the capitol and consisted of Chief Justice WHITON and Associate Justices A. D. SMITH and ORSAMUS COLE, with La Fayette Kellogg as clerk and the late U. S. Senator Cushman K. Davis as assistant clerk.

Justice COLE had at that time been a member of the court for nearly four years, but was less than forty years of age, although his iron gray hair gave him the appearance of being very much older. He heard every argument I ever made in this court, from

my first case in the 13th Wisconsin to my last case in the 50th Wisconsin, and thereupon I became a co-worker with him in the making of thirty-one volumes of Wisconsin Reports.

I thought I knew him well while at the bar, but his real character was never fully appreciated by me until I served with him for years upon the bench. To fully appreciate his character, it was essential that his inner thoughts and life should be revealed in confidential discourse, frequently indulged during the long walks we were in the habit of taking together. He was a rare man and very attractive to those who appreciated a high standard of character.

Equipped with a diploma from Union College at a time when the celebrated Doctor Nott was at its head, and then, after two years' postgraduate study, a certificate of admission to the New York bar, the young lawyer, at the age of twenty-six, took up his residence in a little village on the banks of the Mississippi in Grant county, which, in common with most Western villages at the time, was supposed to have a great future. The territory had already been settled by many able young lawyers, as the records of this court abundantly show. The manner in which ORSAMUS COLE was received by the older citizens, and their estimate of his character and ability, are fully evinced by the way they treated him. Two years after he located at Potosi, and at the age of twenty-eight, he was elected to the very responsible position of delegate to the second constitutional convention, preparatory to the admission of this state into the Union; and he served upon three of the important committees of that body. So efficient were his services in that convention that in the following year, at the age of twenty-nine, he was elected to Congress in the stormy political campaign of 1848.

While in Congress he enjoyed the friendship and confidence of President Taylor, who, although a slaveholder, on one occasion said to him: "COLE, if I were a member of Congress and lived where you do, I would vote for the Wilmot proviso." His party renominated him for Congress in 1850, but he was beaten by a democrat—Benjamin C. Eastman. In 1853 his party nominated him for attorney general of the state, but he was beaten by the late George B. Smith. Singular as it may seem, he was nominated by his party as a candidate for the state senate at the same election, but was beaten by Ex-Governor Nelson Dewey, who received only three majority. In the winter of 1855 he was, without his consent, nominated as the candidate of his party for associate justice of this court, against the sitting member, SAMUEL CRAWFORD, and reluctantly consented to run, and was elected in the following April, and became a member of this court June 1, 1855, when he was less than thirty-six years of age.

Thus it appears that in less than ten years after he became a resi-

dent of Grant county he was six times a candidate of his party for important positions, three times defeated and three times elected. From this it might be inferred that he was not only a partisan but an office-seeker. But no one who knew the equipoise and proverbial modesty of the man will think for a moment that he was either. Obviously, as a candidate of his party for the several offices mentioned, he was acceptable to all and objectionable to none.

His experience in the constitutional convention greatly aided in establishing a commendable state jurisprudence. His term in Congress naturally tended to broaden his views of legislation, government, and law. But his ten years residence in a small country village, remote from the county seat or the capital of the state or the centers of business, with the political interruptions mentioned, necessarily limited his professional opportunities and business. He came to a bench, however, already occupied by two learned and experienced lawyers and judges. Judge COLE has left on record this estimate of Justice SMITH, with whom he served for four years upon this bench: "Judge SMITH was endowed by nature with a singularly original and vigorous mind, which had been invigorated and enriched by much reading and learning. . . . All his opinions were well written and will compare favorably with those of any contemporary judge of our sister states, while some of them are marked by remarkable ability and force of reasoning."

Judge COLE had served with Chief Justice WHITON in the constitutional convention and had the most profound regard for his learning, ability, integrity, and judgment; and always maintained that it was the confidence of the people in his integrity that prevented riot and bloodshed at the time of the Barstow and Bashford trial. Judge COLE was fully justified in entertaining such high regard. Such regard for Judge WHITON was not confined to the members of his own political party, but seems to have been universal. His old associate upon the bench, SAMUEL CRAWFORD, after speaking of him as "one of the most upright and honest of public officers" and of the "degree of consolation" there was in "the memory of a righteous and honest man," presented the preamble and resolutions of the bar of this court, containing, among other things, this sentence: "Amid all the conflicts of party, in both the means by which he attained and the manner in which he discharged the duties of office, the purity of his character ever was unsullied by reproach or even by suspicion." But the most complete summary of Judge WHITON's judicial character, in a single sentence, was made upon his death by Justice A. D. SMITH, as follows: "During our long association, in deliberation upon matters of the gravest concernment, while discussion has been most free and unrestrained, there has never an unkind word, nay, not even a petulant expression been

uttered; but all along his official career he preserved on the bench, and in the consultation room, a strictness of propriety which can scarcely be equaled, a conscientiousness which never wavered, a depth of thought and comprehensiveness of the subject matter ever present, commanding without force, controlling without intrusion, clear and unassuming in his high office, great where he least thought of greatness, but great only wherein man can be truly great, because he was wise and good." Such eulogy is rare, but it was truthfully spoken.

The superb judicial temper and disposition of some great jurists, like JAMES KENT, JOSEPH STORY, and JOHN MARSHALL, have served to exalt the courts and inspire confidence in their judgments. Such temper and disposition were possessed in a large degree by Chief Justice WHITON and Chief Justice COLE.

It was fortunate for Judge COLE and the state that he had the benefit of working four years upon the bench, just when he did, with men so learned, able, and experienced as Chief Justice WHITON and Justice A. D. SMITH. During that time numerous questions of grave importance were presented, ably argued, and determined. The junior member of the court, necessarily, had an opportunity for study, discrimination, and reflection as never before; and no one who knew him will for a moment doubt that he applied himself to his new duties with all the energy he possessed.

But the two men from whom he had thus learned much law and wisdom were about to leave the court, and their places were about to be supplied by younger men with much less experience. Four years after the election of Judge COLE to this bench, Chief Justice WHITON died and LUTHER S. DIXON was appointed in his place; and a few days before the death, BYRON PAINE was elected associate justice in place of A. D. SMITH, whose term was about to expire.

Two months after the death of Chief Justice WHITON, this court opened its regular term on the third Tuesday of June, 1859, and was then composed of Associate Justice COLE, who was less than forty years of age, Chief Justice DIXON, who lacked two days of being thirty-four years of age, and Associate Justice PAINE, who was less than thirty-two years of age. Judge DIXON had been admitted to the bar in Vermont nine years before, had been in this state only eight years at the time, and had been admitted to practice in this court only four and a half years before; but he had served a year as circuit judge. Judge PAINE had been admitted to the bar in Milwaukee ten years before, to the bar of this court five years before, and had for three years been county judge of Milwaukee county. They were both healthy, vigorous, studious, and able, with as much learning as their limited experience would permit. Moreover, they were both original, discriminating, aggressive, courageous, and am-

bitious to put into execution their convictions of duty to the best of their ability. Such minds, in consultation, necessarily at times saw things differently and clashed in opinion; and it was fortunate for the court and the people of the state that the cautious, methodical, conservative, discreet, and firm but gentle spirit of ORSAMUS COLE was present in the deliberations and participated in shaping the judgments of the court.

The opening of the court in June, 1859, marked a new era in its history. The two new members constituted a majority of the court. When they agreed they were irresistible, as evinced in the decisions of the court on the uniformity of taxation, reported in Volumes 9 to 15 inclusive, to which reference has just been made. When they disagreed, Judge COLE was admirably fitted to bring about harmony of judgment if possible.

The separate organization of this court occurred just fifty years ago the first day of last June. It seems to have been divinely appointed that its semi-centennial should be signalized by the funeral and burial of its most conspicuous member. For nearly thirty-seven years of that time Judge COLE was continuously a member of this court, a very remarkable record for a member of an elective judiciary. Six times he was elected by the people of this state, twice, including the last time, without any opposition. Eleven different members of this court were his associates upon the bench. Eight of them are dead; one, Chief Justice LYON, is in retirement; and two are still members of the court.

During the half century the decisions of this court have filled 115 volumes already published, and there is material enough for three volumes more. During the six years Judge WHITON presided there were eight volumes. During the fifteen years Judge DIXON presided there were nearly twenty-seven volumes. During the six years Judge RYAN presided there were fifteen volumes. During the eleven years Judge COLE presided there were thirty-one volumes. During the eleven and a half years since there are, including the material on hand, nearly thirty-eight volumes.

The record of Judge COLE'S judicial services are contained in seventy-eight volumes of the Reports. They constitute his greatest monument. They will abide and continue to influence conduct after the granite column to his memory in yonder cemetery shall have crumbled. A life of good works performed with pure motives is the most enduring monument. Judge COLE made but few professions, but his conduct and example were continuous proclamations.

It was said of Lord Chancellor ELDON, that no one ever doubted his judgments except the noble Lord himself. Judge COLE disposed of all doubts by careful investigation before giving judgment, and then seldom departed from the conclusions thus reached. To say

that some of his conclusions were wrong, is to say that he, too, was human. Perhaps the most striking illustration of departure from established law was upon the question of state supremacy to which reference has been made, and to which the court was committed before he became a member. Speaking of the decisions of the court upon that question, Jonathan E. Arnold once said: "Whether" Justice A. D. SMITH'S "political and constitutional views . . . were true or false, right or wrong, he was the leading spirit that originated and taught them."

Judge COLE was not a genius with powers to thrill and capture the multitude, but a patient, plodding, and conscientious judge, who determined to do what he conceived to be his duty, regardless of public clamor or personal consequences. He was not born for, and did not covet, leadership, but was always attentive and indefatigable in the performance of the work on hand. He was never aggressive, but always thoughtful, laborious, and firm.

After Lord CAMPBELL had sketched the lives of more than one hundred and fifty Lord Chancellors, covering a period of more than six hundred years, he came to the life of Lord CHARLES TALBOT, and said of him: "I find this Chancellor alone without an accuser; without an enemy; without a detractor; without any one, from malice or mistake, to cavil at any part of his character, conduct, or demeanor. While in no respect deficient in judicial gravity and dignity, the flowing courtesy of his manners seems to have won all hearts." With very slight modification, this may be truthfully said of Chief Justice COLE.

But few prominent men, in his time, escaped the biting sarcasm of Chief Justice RYAN, and yet the severest thing he ever said of Judge COLE was that he never allowed the statutes of limitation to run on his resentments. In extenuation it may be truthfully said that Judge COLE had but very few resentments and that each was based upon what he conceived to be good ground. During my long service with him upon the bench, he never, to my knowledge, by word or look, showed any disrespect to any of his associates; and I have no recollection of any of his associates ever showing any disrespect to him.

It has been said by some wise man, whose name I have forgotten, that the gentle spirit makes the hero after all. Judge COLE was that kind of a hero. He was very methodical in his habits, persistent in his application, pure in his purposes, intolerant of all duplicity or wrong, and upright in his judgments.

He was a kind and affectionate husband, a tender and loving father and grandfather. After being an invalid for several years, his first wife died, nearly twenty-nine years ago; but no week passed while he lived in Madison, when his health and the weather

and duty would permit, that he did not show his devotion by visiting her grave and crowning it with flowers. To him she was ever a guardian angel, beckoning him on to the Celestial City.

His second wife was for years also an invalid. To her he was faithfully devoted, and upon her death he tenderly placed her remains by the side of her first husband's in the cemetery at St. Louis.

During the year and a half before he died he was confined to his room and mostly to his bed, at the home of his son in Milwaukee. There, surrounded by loved ones, he bravely, patiently, and with Christian resignation awaited the summons, which finally came on the fifth day of last May. The life-work of ORSAMUS COLE is finished, and the people of Wisconsin all unite in saying that he was a model judge, a model gentleman, and a model man.

The proceedings will be entered of record and published in the Reports.

JUSTICE CHARLES V. BARDEEN.

Mr. M. B. Rosenberry of Wausau presented the following:

Memorial of the Marathon County Bar.

The Committee of the Marathon county bar duly appointed to prepare and present to the circuit court for Marathon county, and to the supreme court of the state of Wisconsin, an expression of the sentiments of the Marathon county bar upon the death of CHARLES V. BARDEEN, justice of the supreme court and formerly judge of the Sixteenth judicial circuit, beg leave to submit the following to this court:

The members of the Marathon county bar hereby express their estimate of the worth of the late Justice CHARLES V. BARDEEN and their profound sorrow over his untimely death.

As a lawyer he was learned and honorable in the practice of his profession and faithful to every trust. As a man he represented the best type of American citizenship. As judge of the Sixteenth judicial circuit he was industrious and lawyerlike, maintaining for himself the highest standards of judicial conduct. These qualities also mark his career as a member of the supreme court of Wisconsin. For many years a member of the bar of this county, we have been proud of his success and his high advancement on the bench.

We mourn for him as a friend and we profoundly feel his loss to the bench and bar of Wisconsin. We express to his family and kindred our deepest sympathy in their sorrow.

M. A. HURLEY, Chairman.
NEAL BROWN,
M. B. ROSENBERRY,
C. L. WARREN.

Mr. Neal Brown of Wausau then addressed the court as follows:

If it please the Court:—The Marathon county bar has recorded the worth of Judge BARDEEN in these resolutions, and I am directed to join in presenting them, with some words of my own, as a memorial to this court, and to ask that they be made a part of the records of the court.

Beneath the conventional phrase of the resolutions lies a world of affectionate remembrance of Judge BARDEEN that cannot easily be put into words. We assure you that this remembrance is the vital living spirit that impelled these resolutions. We cannot express all this in ordered word and phrase, for many of the dearest impulses and emotions of the heart are voiceless before the Great Destroyer. Judge BARDEEN was endeared to the people of Marathon county by many binding ties, and we speak their sorrow in this memorial.

He came to Wausau when it was as yet but a frontier village, a mere outpost on the border line of the great forests. I do not know what chance impelled him to cast his lot with that community, yet in its formative stage. I do know that no full-grown fortune welcomed him there. He did not become debtor there to either wealth or power for his success. With strong hands he hewed it out for himself. He had no expensive habits or pleasures. He did not permit the wonder and charm of hill and forest and stream to distract him from his meager clientage. This was before the heroic age of the Northern Wilderness had passed away. It was the age of the stage coach, of the bateau, of the voyageur, of red-shirted argonauts who steered the rafted lumber over the fierce rapids of the Wisconsin river to placid anchorage in the far off Mississippi. The Indians still kindled their council fires close to the village boundary. It was a glorious time and place for young blood and young manhood. There were perils and hardships of forest and stream, and many graves along the river marked the burial place of adventurous spirits who had tempted the swollen flood too often.

Yet life was warm, and throbbing with vital force. Poverty alone cast upon his life a sombre shade, but he made it a spur to industry. The people gave the young lawyer a pioneer welcome; not a welcome of pink teas and gas-lit afternoon receptions, but a welcome pregnant with all the ties that bind and knit men together. In point of worldly goods they were all poor together, but the wealth of Nature's bestowing lay about them obedient to the mastery of strong and willing hands.

When he hopefully hung up his shingle he had but few books and few clients. The river with its annual toll of lumber brought him more clients than shop or farm. He made friends: Who

could know him and doubt that he would make friends? They loved him alike for his faults and for his virtues, for his faults were human, inspired by a warm heart, a quick imagination, and an innate love of justice and fair play. He never counseled litigation for the sake of litigation, and no client ever complained of his loyalty. He hated sham and pretense, and openly spleened at the empty mouthing oracle of the street corner, the society, or the church. He was no diplomat to speak softly to the fool and let him go his way unrebuked. He had none of the arts of finesse and palaver, but dealt with all affairs simply and directly. "Lofty and sour to those that loved him not, sweet as summer to those that loved him."

Clients multiplied and he grew and prospered. He brought his young wife to Wausau and built there a home. Little children gathered at his knee and sweetened his toil. If he was sometimes too impatient of trifling crosses, he bore the greater griefs of life in pathetic silence. He built for himself lasting fame as a lawyer. In the words of our resolution he was "faithful to every trust." In his practice he was always careful, painstaking, and lawyerlike. When he made mistakes either as a lawyer or a judge, they were always the mistakes of a lawyer, not those of a dunce or a dullard. No client ever failed to give him the fullest trust and confidence. The qualities which made him strong at the bar made him strong on the bench.

As the years passed he grew and broadened, and was finally promoted to a place in this court. You who were his associates will bear testimony to his industry and scholarship. The product of farm and village life, he grew into a man of the world, apt and skilful in judging men and affairs, meeting all men as one who was their fellow. When death comes to such a man we seem involuntarily to trace his life from the cradle upwards, and wish to learn more of him than his public acts can tell us. His boyhood years were passed during the time of the Civil War, when the tumult of great events and great battles filled the air. Men's watchwords were "the preservation of the Union" and "freedom for the slave." The mighty struggle lifted their thoughts above the sordid things of life and placed them close to the stars of light. This ferment of vast forces and these inspirations must have influenced his young mind. It was good to be living then, even the life of the little child, who watched the troops marching to the front, or saw their proud yet sad return. No doubt these early inspirations attended him in later years, for always with him,

"Manhood's noonday shadows held
The dews of boyhood's morning."

In all great sorrows there is the comfort and solace of little things. When we bury such a friend as ours, it seems to bring some

comfort, as we stand by his grave, to think of his cradle time, so remote and far from death.

And now,—who can fitly record the last and saddest chapter of his life? If he could have chosen his historian he would have adjured him in the heart-breaking words of the great dramatist,—

> "If thou didst ever hold me in thy heart,
> Absent thee from felicity awhile,
> And in this harsh world draw thy breath in pain
> To tell my story."

Matured in experience he was yet far from the three score and ten years allotted to man. He was but little past the full noon of manhood when the blight of death commenced to steal upon him. He could have looked out with calm and untroubled eyes upon the lengthening shadows of the western sun falling athwart his pathway to the green old age of sacred promise, for with full hands he was bearing the ripened sheaves of wisdom. The griefs and sorrows of earlier years had become softened and mellowed by broadening charity and kindliness. Life could not hold for him the inspirations, the fire, and ardor of youth, but it could still hold for him, to the last appointed hour, the accumulated fruits of toil and industry. It could hold still in dear remembrance the thought of ambitions achieved, of duties well done, of honors well earned by worth, of friends old and new knit closely to his soul, of family ties that should be to him as the very pulsations of his heart, of books like spread treasures before him, of the goodly fellowship of his brethren on this bench, and of his brethren of the bar who should greet him here from time to time. This was the life, and these the rewards that he had the right to look forward to and to count as his own. But in place of these came to him the prolonged hours of bodily pain, the dumb agony of mind, as he saw the darkness gathering over him. Nature gave him no merciful anæsthesia to dull comprehension. Clinging manfully to the thread of life he came to his last hour, and,—

In the faith of little children he lay down and died.

Mr. Rosenberry then said:

May it please the Court:—To me has been assigned the sad duty of presenting to this court what may be termed the biographical facts of the late Justice BARDEEN's life; and confining myself strictly thereto, by request leaving to others whatever of eulogy and encomium might otherwise have been properly included herein, I submit the following:

CHARLES VALDO BARDEEN was born September 23, 1850, upon a farm near Brookfield, Madison county, New York. His father, Ras-

selas Bardeen, was a native of the same place and was of Scotch or Scotch-Welsh descent; his mother, Mary Palmer Bardeen, was born at New Hartford, Oneida county, New York, and was of Puritan extraction. The Bardeens had been for generations artisans, mechanics, and farmers. The Palmers were well-to-do farmers and engaged in the buying and selling of stock and fitting the same for market. Both families came to this country in the very early history of the New England colonies. CHARLES resembled the Palmers more in physical characteristics and mental temperament.

In 1854 the family removed to the town of Albion, in Dane county, Wisconsin. Here CHARLES attended the country school during the school year, worked with his father upon the farm, and led the life of the average country boy of half a century ago. He was sound and robust of body and well equipped intellectually, and his intense application and industry, together with a set determination to accomplish whatever he undertook, made him in his early life a leader in and out of the school room. When about fourteen years of age he began attending the academy at Albion, Wisconsin, from which he graduated in 1870. After his graduation he entered the law office of J. P. Towne, Esq., at Edgerton, Wisconsin, and began the study of law. In the fall of 1871, while engaged in teaching school in his home district, he received an urgent invitation from Alva Adams, a former schoolmate and since governor of the state of Colorado, to engage with him in the mercantile business at Colorado Springs and Pueblo, Colorado. He procured a substitute teacher and immediately left for the West, where he remained for two years, when he returned to Edgerton and again entered the office of Mr. Towne, where he remained until the following year. He then went to Madison, Wisconsin, and entered the office of Judge Carpenter and attended the law school, graduating from the law department of the university of Wisconsin in 1875.

Upon his graduation he came to Wausau and formed a partnership with Roger C. Spooner under the firm name of Spooner & Bardeen. A short time thereafter they united with Carl H. Mueller, under the firm name of Mueller, Spooner & Bardeen. Upon the retirement of Mr. Spooner from the firm, the firm became Mueller & Bardeen and thus remained for about a year, when the partnership was dissolved. He then became associated with General John A. Kellogg, and remained with him until the time of General Kellogg's death in 1883. The same year a partnership was formed with W. H. Mylrea, afterward attorney general, under the firm name of Bardeen & Mylrea, and in 1885 Louis Marchetti entered the firm, which then became known as Bardeen, Mylrea & Marchetti, which arrangement continued until the time he entered upon the duties of the office of circuit judge, January 1st, 1892. The Sixteenth judicial circuit

was formed by the legislature of 1891, and he became a candidate for the office of circuit judge at the ensuing April election and was elected, after a spirited contest, by a good majority. He remained circuit judge of the Sixteenth judicial circuit from January 1st, 1892, until February, 1898, when he was appointed by Governor Scofield to the vacancy in the supreme court caused by the death of the late Justice NEWMAN. At the expiration of the term of his appointment he was elected for the remainder of the term, which would have expired January 1st, 1904. At the time of his death, March 20th, 1903, he was the only candidate for the place, and undoubtedly would have been re-elected without opposition had he lived.

While engaged in the practice of his profession, and after his promotion to the bench, he took a deep interest in all public affairs and was in the best sense of the term a public-spirited citizen. He gave liberally of his time, talent, and means for the furtherance of any cause which tended to promote the general welfare. He was for many years superintendent of schools in the city of Wausau, having general supervision of the educational interests of the city. He was elected city attorney of Wausau in 1889, and his administration of that office was a great credit to him. During the early part of his professional career he did considerable writing for newspapers and other work of a similar character.

He was married in 1877 to Frances Miller, who, with their three children, Eleanor, Charles Valdo, and Florence, survives him. He was devoted to his home and family, with whom he lived happily, and he was more ambitious for their sake than he was for his own.

In politics he was firmly attached to the principles of the Republican party. While of an ardent and enthusiastic temperament, he was yet not a violent partisan. He was brought up in the Baptist church, but in his later life affiliated with the Universalist congregation in Wausau and the Unitarian congregation in Madison. His life was an exposition of the doctrine of the common brotherhood of man, and he lived and died filled with the hope of a better life beyond.

As a lawyer he was successful, and while the first few years of his practice were beset with unusual discouragements and difficulties he steadily acquired a good clientage. His marked characteristics throughout his career were his sterling honesty, great industry, intense application, and a thoroughness in every thing that he undertook. His success at the bar and upon the bench was due more largely to the great amount of work he put upon his cases than to his unusual native ability.

As a speaker he was forceful and earnest, but was not what would be called in the ordinary acceptation of the term an orator. He was

no phrase maker, but his deep earnestness and sincerity made him a forcible and convincing speaker. He was clear in the statement of his cases and had the careful attention of both court and jury.

He loved his profession, and was ambitious to succeed from a professional standpoint. In his early youth he attended a session of this court, and upon his return home from Madison expressed to his parents his determination and ambition to become a member of the supreme court. He was not a money-maker in the usual sense in which that term is used, but he nevertheless provided well for his family and left them well situated. Throughout his life he was fond of athletic sports of all kinds, and found a great deal of recreation in games both in and out of doors. He never allowed recreation or pleasure to interfere with the serious duties of life. His habits of life were plain and simple. He was straightforward, earnest, and energetic in all that he undertook, and well merited the confidence and affection that was bestowed on him by all who knew him.

I began the practice of law in the circuit over which he presided, and I cannot allow this occasion to pass without expressing for myself, and I believe for every young man who appeared before him, our appreciation of the courteous and kindly treatment which we received at his hands and probably many times little deserved. While at times somewhat hasty and impatient, he reserved whatever of the judicial wrath he displayed for the older members of the bar, and treated the beginner with a consideration and kindliness that was far more helpful than volumes of advice and lectures from the bench. He took a lively interest in all young men, and many a dark place has been lighted and many a rough path been made smooth by the encouragement which he gave them. He died as he had lived, respected, esteemed, and loved by all who knew him.

Mr. Burr W. Jones of Madison also addressed the court, but no record of his remarks has been preserved.

Mr. Justice WINSLOW, for the court, responded:

I have been commissioned by my brethren to make reply on behalf of the bench to the words so fitly spoken by the bar. It is by no means an easy task. So close were my personal relations to Judge BARDEEN, so free and loving our intercourse, so high my regard for his worth, that when I come to speak of him as he deserves to be spoken of my heart swells with emotion and my eyes are dimmed with unbidden tears. I cannot yet realize that he is really gone. Involuntarily I turn to meet that manly form and gaze into those expressive eyes in whose calm depths was no shade of insincerity, only to feel my loss anew.

Justice Charles V. Bardeen.

These proceedings close the official record of his mortal life. It was not a long life, if measured by years. When it closed his powers were at their best, the sun was still at the meridian, the shadows had not yet begun to lengthen to the eastward; yet it was in every true sense a longer life than many which have long passed the three score years and ten of Holy Writ. It had been crowded with earnest and conscientious labor; duties had been bravely met and faithfully performed; it shone with the bright radiance of worthy deeds. In this sense it was a long life; in this sense it was complete.

I feel that I knew him well. We first met in early manhood when hopes were high and life was all before us. For years I watched his course as he made his way steadily and laboriously to professional eminence; for five years never to be forgotten by me we sat together on this bench in that close relationship than which few can be closer, we confided personal cares and perplexities each to the other as only close friends can do, and I think I can truly say that there was never during all this time any rift in our friendship nor any lessening of our mutual confidence.

From this vantage ground of intimate personal acquaintance I would speak without conscious exaggeration of the qualities of the man as they were revealed to me. And first let me speak of the simplicity and transparent honesty of his character. No character can be entirely admirable or wholly great which lacks these qualities, and they were present in the deceased to a marked degree. Unaffected and approachable as a child, neither social nor official position moved him, and the superciliousness of mere wealth excited only his contempt. The humblest citizen could approach him with the certainty of receiving appreciation and respectful consideration. He detested sham and pretense; trickery and chicanery aroused in him a righteous anger. Bluntly honest himself, he demanded honesty in others.

His intellect was honest as well as his heart. When after due consideration his mind assured him of the correctness of a proposition he accepted the result, unwelcome though it might be, and scorned any attempt to avoid it by doubtful reasoning or sophistical argument. Such a man was necessarily absolutely reliable. I do not believe there is any who can justly say that Judge BARDEEN was ever guilty of double dealing. He did not promise one thing and do another, nor did he say one thing to a man's face and another behind his back.

"He put his creed into his deed,
Nor spake with double tongue."

Naturally of a quick temper, he had acquired over it almost complete control, and rarely was it shown except in the presence of what seemed to him to be wrong or oppression. With these char-

acteristics there was coupled mental ability of a high order and industry. He was not a genius in the sense that his mind was exceptionally brilliant or his conversation scintillating, but he possessed those more desirable qualities of a strong common sense, logical mental processes, a strong sense of natural justice, and a capacity and willingness for hard labor. People looked in his open and steadfast countenance and knew that it was an honest countenance; they saw his unremitting industry and they trusted him; they recognized the character that sought justice and right alone and they honored him with high and responsible office. His words, whether written or spoken, always rang true. He had not the graces of the orator or the poet, yet what he said or wrote was effective because it was sound and true. He always proceeded directly to the very heart of the subject in hand; he used simple phrases, homely but forceful language, and appealed rather to the sober judgment than to sentiment or imagination. But he was more than a mere lawyer or judge. Though wedded to his profession and engrossed with its many cares, he found time to take his full share in those matters of public interest which appeal to all good citizens. Every movement for the betterment of the community, whether philanthropic or educational in its nature, commanded his sympathy and support. If not foremost in such movements, he was among the foremost; he filled completely the ideal of the large-minded, thoughtful citizen, ready at all times to put aside for the time mere money-getting and place his intellect, his energy, and his purse at the service of the public.

He was called to the circuit bench by the people of his circuit after an active practice among them of about seventeen years. How admirably he discharged the duties of that office is known to all. To the discharge of these duties he consecrated his talents, his industry, and his judgment which had matured and ripened by the experience of years. No labor was too great if thereby he might ascertain what the voice of the law was. When satisfied of that, he knew no course but to administer it fairly, justly but inexorably, without fear or favor. He heard patiently, examined carefully, deliberated calmly, and decided unflinchingly. He had no favorites to reward, no foes to punish. He was the servant of the law and of the law alone. He brought to this bench the same fidelity, industry, and ability which had marked his whole previous life. His written opinions, contained in eighteen volumes of the Reports, constitute a more convincing and durable memorial to his ability as a lawyer and a judge than any eulogy which could be written. In them his sturdy common sense, his vigorous English, his innate sense of justice, and his convincing logic appear at their best. They will rank well up with the opinions of the state's greatest jurists.

Justice Charles V. Bardeen.

But there was another side to his character on which I also love to dwell. I mean "that best portion of a good man's life, his little, nameless, unremembered acts of kindness and of love." He was so human, so full of sympathy, so unmindful of himself and responsive to the appeals of the suffering and afflicted. He was ever bearing burdens not his own. In these acts there was no ostentation. Few knew of them save the immediate parties, and none can ever know their full number or extent. But that they were numerous and even of almost daily occurrence I know full well. "No sad, low-spoken word e'er plead with his human heart unheard;" no weary, toiling mortal came to him for sympathy and encouragement and was turned away without it. His heart was ever open, his sympathy always ready. And what a friend he was in the truest sense! As a very close friend of his recently expressed the idea to me, "You could always tell him things." What a world of comfort there is in having such a friend! One whom you know you can trust, and to whom you can confide your inmost thought and your most perplexing difficulties with the assurance of instant appreciation and sympathy. This, indeed, is the supreme test of friendship. Such a friend he was to many who now feel that the pilgrimage of life is more weary than before.

It goes without saying that his family relations were wellnigh ideal! This is almost too sacred a subject to be dwelt upon here, but it is only right to say that a more devoted and unselfish husband and father is rarely found. No personal sacrifice was too great if thereby the happiness of his family was promoted. When they were happy he was happy, and in his home he found his truest delight.

But he has laid down all his burdens. The able and incorruptible judge, the large-minded citizen, the faithful and sympathetic friend will go in and out among us no more. But, thank God, the record of his life cannot be taken from us, and ever and anon in our quiet hours of revery, fond memory, that blessed consoler of the stricken heart, will bring back to us that gracious presence and build anew the shattered column of friendship. The world is better because he lived, and this is the final test.

CASES DETERMINED

AT THE

August Term, 1903.

LANG, Respondent, vs. MENASHA PAPER COMPANY, Appellant.

March 26—September 8, 1903.

Mechanics' liens: Filing of claim: Duty of clerk: Payment of fees: Contracts: Reasonable time for performance.

1. A claim for a mechanic's lien is "filed," in legal contemplation, when presented to the clerk to be filed, and retained by him as such clerk.
2. Although the clerk may, under sec. 748, Stats. 1898, require his fees for filing such claim to be paid in advance, if such payment is not made nor requested when the claim is presented for filing it is his duty, nevertheless, to place his file mark upon the claim and docket it; and his failure to perform that duty will not prevent the filing from being effectual.
3. Where a building contract fixes no time for the completion of the work, a reasonable time is to be regarded as being within the contemplation of the parties; and what is a reasonable time depends upon all the circumstances of the particular case.

APPEAL from a judgment of the circuit court for Gates county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This action was commenced May 27, 1902, to enforce a lien for labor and materials furnished to the defendant in the excavation for, and construction of, the foundation walls and foundation for a pulp mill, between October 16, 1901, and March 1, 1902, pursuant to an express contract in writing

made by the plaintiff and the secretary of the defendant, October 16, 1901, as follows: "October 16, 1901. It is agreed between *R. A. Lang* and M. H. Ballou that *R. A. Lang* build a foundation according to plans submitted, including floors for pit, for the sum of $8,000. [Signed] R. A. LANG. M. H. BALLOU"—which agreement was subsequently modified by parol, whereby the plaintiff undertook and agreed, in consideration of an additional payment of $500, to excavate one foot deeper than shown by such plans, and to add one foot to such foundation walls. The complaint alleges the making of such contract; that no part thereof had been paid, except $3,500; that there was still due the plaintiff thereon $5,000, with interest from March 1, 1902; and that the plaintiff's claim therefor had been filed with the clerk of the circuit court May 23, 1902.

The defendant answered to the effect that the plaintiff ought reasonably to have completed the work on or before December 15, 1901; that the plaintiff failed and neglected to perform the contract with all reasonable dispatch, and did not complete it until March 1, 1902, to the defendant's great damage; and alleges such failure and neglect by way of counterclaim, and alleges that its expenses and loss in consequence thereof was at least $84 per day, amounting, in all, to $5,208, and asked that the same be offset as a counterclaim against any sum due from the defendant to the plaintiff on the contract, and for judgment in its favor for the balance.

The plaintiff replied to such counterclaim, and alleges, among other things, in effect, that there was no provision in the contract as to when it should be completed; that the plaintiff commenced the performance of the work immediately after the contract was made; that such work was prosecuted with all reasonable diligence, and completed within a reasonable time; that defendant made payments on such contracts from time to time with full knowledge of all the facts and the progress being made, and on completion ac-

cepted the same and has ever since used the same for the purposes for which it was erected; that on or about January 1, 1902, the defendant refused to make further advances or pay for the work then completed, and then for the first time claimed that the work was not being prosecuted as rapidly as desirable, and claimed damages on account of the delay; that the plaintiff replied that such failure to make advances and payments as agreed would necessarily delay completion of the work; that the plaintiff informed the defendant that he would only perform with the express understanding and agreement that full contract price would be paid for performance, without any deduction for pretended damages by reason of delay; that the defendant thereupon directed the plaintiff to proceed with the work, and thereafter made payments; and the plaintiff claimed that, by reason of the facts alleged, the defendant was estopped from claiming damages by reason of such delay.

At the close of the trial the court found, in effect, (1) that all the allegations of the complaint were true; (2) that October 16, 1901, the parties entered into the written contract mentioned: (3) that the contract was subsequently modified, as stated; (4) that the plaintiff fully performed all the conditions of such agreements; that by reason of the peculiar conditions of the soil necessary to be handled in the excavation of such additional foot, the plaintiff was unable to complete such work within the time in which both parties expected that the work would be completed at the time of making the original contract; (5) that prior to January 1, 1902, the defendant made claim against the plaintiff for damages because of such delay; that on that day the plaintiff notified the defendant that if he proceeded further with the performance of the contract, it would be with the understanding and agreement that no claim for damages should be made; that thereafter the defendant continued to direct the plaintiff to prosecute such work as vigorously as possible, and thereafter,

and on January 30, 1902, paid to the plaintiff on the contract $2,000; (6) that the plaintiff performed the contracts and completed the same within a reasonable time from the making thereof; (7) that May 22, 1902, the plaintiff duly filed his claim for lien with the clerk of the circuit court; that the same was not docketed until June 21, 1902; that the fees of the clerk were paid by the plaintiff before the trial of this action; that no demand was made therefor by the clerk; (8) that the first work done and materials furnished under the terms of the contract by the plaintiff was October 23, 1901, and that the date of the last charge for such work, labor, and materials was March 5, 1902; (9) that the defendant paid to the plaintiff on the contracts $3,500, as stated, and there still remains due and unpaid thereon $5,000, with interest thereon from March 5, 1902, and that the same is a lien on the premises mentioned; (10) that the premises described belong to the defendant, and are not within the limits of any incorporated village or city, and do not exceed forty acres of land; (11) that the allegation in the counterclaim that the plaintiff did not push and prosecute the work in the contracts, as agreed, is untrue; (12) that the allegation in the counterclaim that the work could reasonably have been completed on or before December 15, 1901, is untrue; (13) that the allegations in the counterclaim to the effect that the defendant sustained damage because of failure on the part of the plaintiff to complete his contracts within a reasonable time is untrue; (14) that the allegations in the reply to the counterclaim are true.

And as conclusions of law the court found, in effect, that the defendant is not entitled to set off as against the contract price for the work and labor performed and materials furnished by the plaintiff any sum on account of any damages claimed by reason of the facts set forth in the counterclaim; that the plaintiff is entitled to recover of the defendant $5,000, with interest thereon from March 5, 1902, amount-

ing, in the aggregate, to $5,104.17, with costs and disbursements to be taxed, and a judgment directing that the interest of the defendant in the premises described at the time of the commencement of said work and the furnishing of said materials, to wit, October 16, 1901, or any person claiming under it since that time, or so much thereof as should be necessary, be sold to satisfy the amount of such lien and costs. From the judgment entered thereon accordingly the defendant appeals.

Silas Bullard, for the appellant.

For the respondent there was a brief by *Frawley, Bundy & Wilcox,* and oral argument by *C. T. Bundy.*

CASSODAY, C. J. It is claimed that the plaintiff is not entitled to a judgment for a lien in this action, for the reason that he failed to file his claim for a lien, as prescribed by the statute, until after the commencement of the action. Sec. 3321, Stats. 1898. That section authorizes "any person having" filed a claim as prescribed by the previous sections to "foreclose the same by action." Such filing of the claim is manifestly a condition precedent to the right to commence such foreclosure action. This is virtually conceded by counsel for the plaintiff. It is claimed, however, that it was so filed before the commencement of this action. It appears and is undisputed that a claim in due form, as required by the statute, duly signed by the attorneys for the plaintiff and petitioner, was sent to the clerk of the circuit court, with direction to file the same and send his bill therefor to such attorneys; that May 22, 1902, the clerk received such claim, and acknowledged the receipt thereof, as requested, by letter addressed to such attorneys, dated on the day and year last mentioned, and stating therein, in effect, that such "claim for a lien in favor of *Robert A. Lang v. Menasha Paper Company*" had been "duly received for filing," and that the fee therefor was thirty-five cents; that the clerk made no demand

for the payment of such fees, and the same were not paid until June 21, 1902; that such claim for a lien remained in the office of the clerk from May 22, 1902, to the trial of the cause, July 10, 1902, but was not docketed by the clerk until June 21, 1902. The statute requires the clerk to docket "each claim for lien filed with him immediately upon its filing." Sec. 3319, Stats. 1898. In the language of our late Brother PINNEY:

"The statute provides for both *filing* and docketing the claim, and these are entirely different things. The law requires the *party* to file his claim for a lien, and the *clerk* is to docket it." *Goodman v. Baerlocher,* 88 Wis. 298, 60 N. W. 418.

Here the plaintiff delivered his claim to the clerk to be filed in his office. It was for the clerk to put his file mark upon it and to make the docket entries. Neither of these things could be done by the plaintiff, and the improper failure of the clerk to do them did not prevent the filing from being effectual. Id.; *Bailey v. Costello,* 94 Wis. 87, 91, 68 N. W. 663; *State ex rel. Kaltenbach v. Shiel,* 114 Wis. 255, 90 N. W. 112, and cases there cited. In legal contemplation, the claim was filed when it was presented to the clerk to be filed, and retained by him as such clerk. Id. True, the statute authorized the clerk to "require his fees" for filing such claim "to be paid in advance." Sec. 748, Stats. 1898. But he made no such requirement; and, in the absence of such requirement, his duty was to put his file mark upon the claim and docket the same. We must hold that the claim was filed May 22, 1902, within the meaning of the statutes.

2. It is conceded that the time for the performance of the contracts on the part of the plaintiff was not fixed or mentioned therein, but was left open and indefinite. It is well settled that when no time is mentioned in an agreement for the performance thereof, a reasonable time is to be regarded as being within the contemplation of the parties. *Waterman*

v. Dutton, 6 Wis. 265; *Nudd v. Wells,* 11 Wis. 407; *Inter-Ocean T. Co. v. Sheriffs,* 54 Wis. 202, 11 N. W. 480; *Boyington v. Sweeney,* 77 Wis. 55, 65, 45 N. W. 938, 941, and cases there cited. As stated by Mr. Justice TAYLOR in the case last cited: "What will in the particular case be a reasonable time depends upon the nature of the act to be done, the nature of the contract, and all the circumstances relating to the same;" in other words, it is largely a question of fact. The facts found by the trial court in the case at bar are amply supported by the evidence, and they fully justify the conclusions reached by that court.

By the Court.—The judgment of the circuit court is affirmed.

SIEBECKER, J., took no part.

O'BRIEN, Administrator, Appellant, vs. WISCONSIN CENTRAL RAILWAY COMPANY, Respondent.

March 27—September 8, 1903.

Railroads: Killing of child at street crossing: Negligence: Lookout on engine: Unlawful speed: Proximate cause: Contributory negligence: Court and jury.

1. In an action against a railway company for the killing of a child at a street crossing, where it appeared, among other things, that the engineer was on the lookout on his side of the train all the time as it approached the crossing, but by reason of a curve could not see the other side of the track whence the child was coming, the mere fact that just before reaching that street the fireman, in performing his duties, got into a position where he could not look ahead, cannot be regarded as negligence.
2. Secs. 1809, 1809*a*, Stats. 1898, construed together, make it unlawful to run trains faster than six miles an hour over street crossings in a city, except where gates are maintained as provided in the latter section.

3. Whether, in this case, the unlawful speed of a train was the proximate cause of the killing of a child at a street crossing, is *held* to have been a question for the jury.
4. A child twenty-five months old is not chargeable with contributory negligence.
5. Plaintiff's child, twenty-five months old, left him while he was splitting wood back of his house, went out through the front gate upon the sidewalk, thence a short distance across defendant's railway track, and then started to return. Plaintiff missed the child, looked for him in front of the house, and saw him coming back on the sidewalk toward the track. He started on the run, but before he could reach the track defendant's train ran over and killed the child. *Held*, that the question of the parents' contributory negligence was one for the jury.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This action is to recover damages for the alleged negligent killing of the plaintiff's infant son June 18, 1901, at a street crossing in the city of Ashland. Issue being joined and trial had, the court at the close of the testimony directed a verdict in favor of the defendant, and from the judgment entered thereon the plaintiff brings this appeal.

The negligence alleged is the excessive speed of the train and the failure to keep a lookout in the direction in which the train was going at the time. It appears, and is undisputed, that the defendant's passenger depot is within the city limits; that the defendant's line of railway from that city to Chicago at first runs directly east for seven blocks to Sixth Avenue East; that just before crossing that avenue it begins to turn to the southeast, and continues to do so until after crossing Seventh Avenue East; that on the evening in question the defendant's regular passenger train for Chicago left the depot at 7:25 p. m., and when it reached Seventh Avenue East it ran over the child and injured it so that it died the next morning. There is evidence tending to prove that the plaintiff was a laboring man, thirty-nine years of age; that he lived with his family, consisting of his wife and three

children, on the west side of Seventh Avenue East, and in the second house immediately south of the railway track; that he came home from his work at half past six o'clock; that after he had his supper, he went back of the house to an alley, 150 feet from his front gate, to prepare some wood, and little Johnny, then twenty-five months of age, went with him; that while the plaintiff was engaged in splitting wood Johnny left his father and went to the front of the house, through the front gate, out upon the avenue sidewalk, thence north on the sidewalk across the defendant's railway track to a point some distance north of the track, when he turned around and went back south along the same sidewalk, and that as he was attempting to cross the railway track he was struck by the train and so injured that he died the next morning; that when the plaintiff was in the act of carrying an armful of wood into the kitchen, he missed the child, and so dropped his wood, and looked in front, and saw the child, then twenty to twenty-five feet north of the track, running along the sidewalk toward the track, and he immediately started on the run for the child with all his speed, but the train got to the child first; that when he first discovered the child, he was 140 feet from him on the line he went, and that the train at that instant was 225 feet from the child. It is practically undisputed that the engineer kept a lookout on his side of the train all the time as it approached Seventh Avenue East, and could see the track and south of it, but could not see north of the track by reason of the curve in the track; that just before reaching Sixth Avenue East, the fireman, whose place was on the north side of the cab, got down on the deck, and pulled the door open, and reached over with his left hand for the injector, to keep the engine from blowing off, and so could not see the track as the train approached Seventh Avenue East; that the roundhouse foreman, who happened to be riding in the cab to his place of business, about a mile from the depot, when the engine was about at

the alley mentioned looked through the front cab door, and saw the little child thirty to thirty-five feet north of the center of the track, walking north on the sidewalk, away from the track; that he then turned around to speak to the engineer, who failed to hear him, when he again looked ahead and saw the child, then about fifteen or twenty feet from the track, running toward it; that he immediately called to the engineer, who turned his head in through the window, set the brake, and reversed the engine just as soon as he possibly could, and the train was stopped as soon as possible; that the automatic air bell was ringing all the time.

For the appellant there was a brief by *Dufur & Alvord,* and oral argument by *J. F. Dufur.*

For the respondent there was a brief by *Howard Morris* and *T. H. Gill,* and oral argument by *Mr. Gill.*

CASSODAY, C. J. We cannot say that there was any error in refusing to submit to the jury the question whether the defendant was negligent in failing to keep a lookout in the direction in which the train was going at the time. The facts are given in the foregoing statement. The engineer was on the lookout on his side of the train all the time as they approached Seventh avenue. The mere fact that the fireman, in pursuance of the requirements of his duties, just before reaching that avenue, got down on the deck, where he could not look ahead, cannot be regarded as negligence, under the circumstances stated.

2. But there is evidence tending to prove that the train was at the time going at the rate of more than six miles per hour. The statute declares, in effect, that "no train or locomotive shall go faster" in any city or village "than at the rate of six miles per hour," until it has "passed all the traveled streets thereof." Sec. 1809, Stats. 1898. But counsel for the defendant contend that the next section of the statute makes an exception to the general rule, and permits a speed of fifteen miles an hour, and only requires gates to "be placed

and maintained upon such street crossings" when directed by the city or village authorities (sec. 1809*a*, Stats. 1898); in other words, that the statute authorized a speed of fifteen miles an hour without gates, but simply required railway companies to construct gates when directed to do so by the city or village. In support of such contention, counsel seem to rely upon *Nolan v. M., L. S. & W. R. Co.* 91 Wis. 16, 22, 23, 64 N. W. 319. It was there held that the statute had no application to unincorporated villages, but it was there said, in effect, by our late Brother PINNEY, that the two statutes must be construed together; that the act from which the last section was taken is entitled "An act to *limit the rate of speed* of railroad trains and locomotives in incorporated villages and cities" (ch. 467, Laws of 1891); that railway corporations were thereby relieved from slowing down all trains in cities and villages to six miles an hour, "on condition that some adequate security should be afforded in the case of an increased rate of speed to fifteen miles an hour, and to that end it was provided," among other things, in the language of the statute, "that gates shall *first* be placed and maintained upon such street crossings within cities and incorporated villages over which trains shall pass, as the public authorities of any such city or village may direct." Certainly, the opinion of Mr. Justice PINNEY does not bear the construction placed upon it by counsel. But it is unnecessary to discuss the question as to the meaning of the sections of the statutes cited, since it is fully covered by the opinion of Mr. Justice DODGE in the recent case of *Schroeder v. W. C. R. Co.* 117 Wis. 33, 44, 45, 93 N. W. 837, 840, 841. It was there expressly "held that the two statutes should be construed together, and required a railroad passing through an incorporated city to operate its trains over street crossings at not to exceed six miles per hour where no gates had been erected as authorized by the latter section." The evidence was certainly sufficient to take the case to the jury on the question whether the train was at the time running at an unlawful rate of speed. For

the purpose of this appeal, we must assume that it was running at an unlawful rate of speed.

3. This being so, we cannot say, as a matter of law, that such unlawful rate of speed was not the proximate cause of the injury and death of the child. Of course, a child of such tender years is not chargeable with contributory negligence. If it is claimed that the parents were, that would, at least, be a question for the jury. *Hoppe v. C., M. & St. P. R. Co.* 61 Wis. 357, 21 N. W. 227; *Hooker v. C., M. & St. P. R. Co.* 76 Wis. 542, 44 N. W. 1085. The liability of a railway train running over pedestrians, and especially children, in cities and villages, is, of course, much greater than in the country. The object of the statutes so limiting the rate of the speed of trains in cities and villages was to prevent such injuries. The question of proximate cause was properly for the jury, under appropriate instructions from the court.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

SIEBECKER, J., took no part.

WARD and another, Respondents, vs. AMERICAN HEALTH FOOD COMPANY, Appellant.

May 8—September 8, 1903.

Contracts: Advertising in street cars: Leasing or personal services: When executed: Termination: Damages for breach: Pleading: Equitable counterclaim: Costs.

1. Plaintiffs contracted to insert defendant's advertising cards in a certain number of cars on certain street railways "for the term of twelve months from July 10, 1900." Defendant was to pay therefor $470 per month—"the rent each month to be paid in advance;" and the contract provided that "nonuse of space from advertiser's act or omission is advertiser's loss." The cards were to be subject to the approval of plaintiffs and of the railway companies. Prior to July 10, 1900, plaintiffs procured the insertion of the cards as agreed, but it appears that

no particular space in particular cars was secured by them for the term of the contract. On September 27, 1900, defendant directed plaintiffs to remove the cards from all cars, but plaintiffs refused, and continued the insertion of the cards up to July 10, 1901. *Held*, that the contract was not in the nature of a lease or subletting of certain spaces in the cars, but rather in the nature of a contract for personal services. It was therefore not fully executed on July 10, 1900, when plaintiffs had procured the insertion of the cards, but was still executory at the time when defendant directed their removal.

2. The contract being executory, defendant had the right, by giving such notice, to stop further performance by plaintiffs, and thereby limited its further liability to damages for its breach of the contract.

3. In an action upon the contract, in which plaintiffs did not allege such breach or damages therefrom, but sought to recover the full contract price on the theory of full performance, it is *held* that they cannot recover damages for such breach, but only those monthly instalments of the contract price which had been earned or partially earned before the contract was terminated by defendant.

4. In an action upon contract, although defendant interposed an equitable counterclaim for reformation of the instrument, plaintiffs are *held* entitled to recover only the costs allowable under the statutes in actions at law on contract.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Two actions are here consolidated, each to recover different instalments claimed to be due to the plaintiffs from the defendant upon the same written contract. It is undisputed that the plaintiffs are copartners doing business in the city of New York, and that the defendant is a Wisconsin corporation doing business in Milwaukee; that June 5, 1900, Isaac J. Cohn, the soliciting agent of the plaintiffs, was in Milwaukee at the defendant's office, and a written proposition was then and there drawn up and signed by the defendant in the words and figures following, to wit:

"June 5th, 1900.

"*To Ward & Gow:* You are hereby authorized to insert in the cars designated on the reverse side hereof, 1,050 copies

of our advertising card, size 11x21 inches each, one in each car up to that number, for the term of 12 months, from July 10th, 1900.

"In consideration thereof we hereby agree to pay to the order of Ward & Gow, the sum of four hundred and seventy dollars ($470) per month—the rent each month to be paid in advance at end of each month. Signs to be furnished by the advertiser.

"The advertiser reserves the right to cancel this contract on Aug. 10, 1900, by paying $92.50-100 additional, and giving notices in writing prior to August 10th.

"This contract is not binding unless approved by Ward & Gow. All payments must be made to their order. If any cash instalment, provided for herein, is due and unpaid for ten days, this contract may be terminated at their option. If for any cause before the termination of this contract the lessees of any of the car spaces herein included shall cease to have the right to maintain, control, or continue the advertising in or upon the cars of any railroad named therein, the right is reserved by Ward & Gow to cancel such portion thereof without prejudice to the whole. The form, wording, and illustrations of all signs is subject to their approval and that of the railroad company in whose cars they appear. Nonuse of space from advertiser's act or omission is advertiser's loss. Any loss of time or space not caused by the advertiser shall be made good by additional time or space. An essential condition of this contract is that advertiser's privileges cannot be assigned or sublet. Nothing omitted herefrom binds either party.

"Approved June 8th, 1900.

"[Signed] AMERICAN HEALTH FOOD CO.
"JOHN L. BEEBE, V.-Pres.,
"Address 270 So. Water St.,
"WARD & GOW, Mil., Wis.
"By LOUIS COHN, Manager.
"500 cars N. Y. 'L.'
"550 cars Brooklyn, N. Y.
"One-half of each road."

Isaac J. Cohn then took such written proposition so signed by the defendant to the city of New York, where the same

was approved by the plaintiffs June 8, 1900, and stating therein that: "500 cars N. Y. 'L.'—550 cars Brooklyn, N. Y.—one-half of each road." On the same day of such approval the plaintiffs wrote to the defendant acknowledging the receipt of the contract, and therewith inclosed a duplicate of the same, duly approved by the plaintiffs.

On November 17, 1900, the plaintiffs commenced an action to recover the first four instalments of $470 each, amounting to $1,880, and the complaint therein alleged, in effect, that the plaintiff had in all respects complied with the terms and conditions of the contract, and had inserted 1,050 copies of the advertising card of the defendant, size 11x21 inches, one half in the N. Y. "L." and one half in the Brooklyn Railway Company; that such insertion commenced July 10, 1900, and continued from that date, and was still being continued; that the defendant had not exercised its right reserved in the contract to cancel the same by giving notice in writing prior to August 10, 1900, and that such contract had not been modified, but was in full force and effect, and that the four instalments mentioned became due and owing to the plaintiffs November 10, 1900, and were still due and owing from the defendant to the plaintiffs; and demanded judgment therefor, with interest on each instalment from the time it became due.

On August 30, 1901, the plaintiffs brought a second action for the eight additional instalments of $470 each, amounting to $3,760. The complaint in that action contained, in substance, all the allegations of the complaint in the first action, and, in addition, alleged that the plaintiffs had contracted for advertising space in the elevated street railways mentioned, and several others; that no part of any of such instalments had been paid, although demanded; and demanded judgment therefor, with interest on each instalment from the time it became due.

The defendant answered the consolidated actions by way

of admissions, denials, and counter allegations, and, among other things, in effect, denied the making of the contract as alleged, denied that the plaintiffs had complied with the contract, denied that the defendant had not canceled the contract or modified it, and alleged that the contract so made was for three months only and by mistake it named twelve months, that the time of the commencement for the contract was postponed for some time after July 10, 1900, named therein; that it was canceled after it had been commenced one month; and also alleged by way of counterclaim a mistake in making the contract in the respects mentioned, and asked to have the same reformed. The plaintiffs replied to the counterclaim.

A jury having been waived, the cause was tried by the court, and at the close of the trial the court found, in addition to the admitted facts mentioned, in effect, that June 12, 1900, the defendant sent the plaintiffs 1,050 cards to be placed as agreed; that June 19, 1900, the cards were received by the plaintiffs, and thereupon the plaintiffs placed or inserted 500 of such cards in the N. Y. "L" and 550 in the Brooklyn Elevated, and continued the insertion of such cards in the manner provided for in the contract from June 19, 1900, up to and including July 10, 1901, and that the plaintiffs had in all respects complied with the terms and conditions of the contract; (6) that the defendant did not exercise the right to cancel the contract; that the $92.50 additional therein mentioned was not paid by the defendant to the plaintiffs on August 10, 1900, and that no notice in writing was given by the defendant to the plaintiffs of its intention to cancel the contract prior to August 10, 1900; (7) that the contract so made was not changed or modified in any respect; (8) that at the time of signing the contract the officers of the defendant knew that Isaac J. Cohn was acting in the capacity of solicitor and was without authority to make or accept the said contract on behalf of the plaintiffs; (9) that, subsequent to the acceptance of the contract by the plaintiffs, no representa-

tion was made by them to the defendant that Isaac J. Cohn had any authority other than that possessed at the time the contract was entered into; that Isaac J. Cohn was not authorized by the plaintiffs to make, modify, or in any manner change the contract between the plaintiffs and the defendant; (10) that no agreement was made by Isaac J. Cohn on behalf of the plaintiffs or otherwise with the defendant, or any person acting on its behalf, whereby the terms of the written contract between the plaintiffs and the defendant were changed or modified in any manner or in any respect; (11) that the contract above set forth was the contract actually made and entered into by the plaintiffs and the defendant, and that no other or different contract was made between the parties, and that there was no mutual mistake in reducing the contract to writing, and that the contract was for the term of twelve months as stated therein; (12) that no part of the consideration provided for in the contract has been paid to the plaintiffs by the defendant; (13) that September 27, 1900, the defendant directed the plaintiffs, in writing, to remove from all cars their cards which had been inserted pursuant to the terms of the contract; that the plaintiffs refused to remove said cards; that at no time from July 10, 1900, up to and including July 10, 1901, could the plaintiffs get contracts to fill such space, notwithstanding they made due and diligent effort to obtain contracts in order to fill all the spaces under and controlled by them in such elevated roads; (13½) that August 24, 1900, the plaintiffs received a letter from the defendant dated August 22, 1900, stating, "Kindly let us know when our month expires, and cancel the contract thirty days from the extended date of the contract for the present;" (14) that all the allegations of the complaint in both actions are proven and true; (15) that the equitable counterclaim of the defendant has not been proven and is untrue.

And as conclusions of law, the court found, in effect, that

the contract was fully executed by the plaintiffs; (2) that there was due to the plaintiffs for principal $5,640, and for interest $491.62, making $6,131.62; (3) that the prayer for the reform of the contract be, and the same was thereby, denied; (4) that the plaintiffs are entitled to judgment dismissing the equitable counterclaim, and for a money judgment against the defendant for the amount last stated, with costs; and ordered judgment accordingly. From the judgment so entered the defendant appeals.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas,* and oral argument by *F. W. Remington.*

For the respondents there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Wheeler P. Bloodgood,* of counsel, and oral argument by *Wheeler P. Bloodgood.* They contended, *inter alia,* that appellant contracted for and agreed to pay a stipulated sum for a certain space, whether it used it or not, and plaintiffs agreed to reserve such space. If this contract is to be governed by the principles governing leases, as held in the case of *Bours v. Kimball,* 46 Ill. App. 327, the law in New York is well settled that the recovery is the rent for the full term. *Clendinning v. Lindner,* 9 Misc. 682; *Gray v. Kaufman D. & I. C. Co.* 9 N. Y. App. Div. 115; *Reich v. McCrea,* 59 Hun, 625, 13 N. Y. Supp. 650; *Becar v. Flues,* 64 N. Y. 518; 18 Am. & Eng. Ency. of Law (2d ed.) 303, 304, and cases cited in note 7. On the other hand, if the contract be regarded as an executed sale of a chattel, where the vendee has taken possession and title passed, it is well settled under the authorities that the vendor may recover the price agreed. 2 Sutherland, Damages, § 347; Mechem, Sales, § 1618; *Hunter v. Wetsell,* 84 N. Y. 554; *McClure v. Williams,* 5 Sneed (Tenn.) 718; Schouler, Pers. Prop. § 528; *Mason v. Decker,* 72 N. Y. 595; *Quick v. Wheeler,* 78 N. Y. 300; *Hayden v. Demets,* 53 N. Y. 426; *Dustan v. McAndrew,* 44 N. Y. 72; 19 Ency. Pl. & Pr. 7.

The contract was not one of service. It shows on its face that plaintiffs undertook nothing requiring any skill. Defendant was to furnish the signs, and if it failed to furnish them it was its own loss. All the plaintiffs undertook to do was to sell, or lease, or license to defendant certain spaces in certain cars designated in the contract. The clause making the signs subject to approval was merely to give the right to prevent the space being used for immoral or improper purposes. See *Central L. & E. Co. v. Moore,* 75 Wis. 170, 43 N. W. 1124, note. Even though the contract be regarded as a contract for hire, the plaintiffs are entitled to recover the contract price. It is well settled that the measure of damage for the breach of a contract for services is the amount of compensation agreed upon. 5 Am. & Eng. Ency. of Law, 35; *Bergin v. Wemple,* 30 N. Y. 319; *Howard v. Daly,* 61 N. Y. 362; *Barber v. Knickerbocker L. Ins. Co.* 24 Wis. 630.

Cassoday, C. J. Error is assigned because the court found as a matter of law that the contract "was fully executed by the plaintiffs on the 10th day of July, 1900." That is the day named in the contract upon which the plaintiffs were to commence performance; and the contract expressly provides that it should continue "for the term of twelve months from July 10, 1900." By the fifth finding of fact the court found that the plaintiffs commenced such performance June 19, 1900, and continued such performance "up to and including the 10th day of July, 1901." Manifestly, by some inadvertence, the wrong year is named in the conclusion of law mentioned. At all events, such conclusion cannot overturn the language of the contract and the express finding of fact mentioned. In other words, the plaintiffs have recovered in this action the $470 per month for doing the things they agreed to do in the contract during the whole of the twelve months which terminated July 10, 1901.

2. Counsel for the defendant contend that the time when

the performance was to commence under the contract—July 10, 1900—was, on or about that time, indefinitely postponed by correspondence and oral negotiations between defendant and Isaac J. Cohn, the soliciting agent of the plaintiffs in procuring the contract from the defendant. By the eighth, ninth, and tenth findings the court found, in effect, not only that Isaac J. Cohn never made any such agreement, but also that he never had any authority to make such an agreement, and that the defendant knew that he was merely "acting in the capacity of solicitor, and was without authority to make or accept the contract on behalf of said plaintiffs." Such findings of the court are abundantly supported by the evidence.

3. In and by the terms of the contract, the defendant reserved the right to cancel the contract August 10, 1900, by paying $92.50 additional, and giving notice in writing prior to August 10, 1900. Both complaints allege that the defendant failed to exercise such reserved right. The defendant took issue with such allegations, and alleges, in effect, that the "contract was duly annulled, discontinued, and canceled by due and sufficient notice in writing given by the defendant to the plaintiffs in due time and before the end of the first month." By the sixth finding the court found that the $92.50 was not paid by the defendant to the plaintiffs August 10, 1900; that no notice in writing was given by the defendant to the plaintiffs as therein agreed; and that the defendant had not exercised its reserved right to cancel the contract as therein stipulated. Such findings are abundantly supported by the evidence. It follows that the letter received by the plaintiffs from the defendant August 24, 1900, wherein they were told to "kindly let us know when our month expires, and cancel the contract thirty days from the extended date of the contract for the present," as mentioned in finding 13½, did not have the effect of relieving the defendant from further liability on the contract.

4. The defendant insists by way of counterclaim that there was a mutual mistake in reducing the contract to writing, in that it should have been "for the term of three months from July 10, 1900," as actually made, instead of "for the term of twelve months from July 10, 1900," as written; and prayed a reformation of the contract accordingly. Such counterclaim was put in issue by the reply. The court, by the fifteenth finding, found that such counterclaim had not been proved and was untrue; and the evidence fully supports such finding.

5. The complaint in the consolidated action alleges, and the court found, in effect, that the plaintiffs had inserted the defendant's cards, and continued the insertion of such cards in the manner provided for in the contract, from June 19, 1900, up to and including July 10, 1901, and that the plaintiffs had in all respects complied with the terms and conditions of the contract on their part. The court further found, in effect, that September 27, 1900, "the defendant directed the plaintiffs, in writing, to remove from all cars their cards which had been inserted pursuant to the terms of the contract," but that "the plaintiffs refused to remove" the same. The defendant contends, in effect, that, as the contract was executory at the time such direction was given by the defendant, the giving of such direction had the effect to stop further performance on the part of the plaintiffs, and limit its further liability to damages sustained for the breach of the contract. On the other hand, the plaintiffs contend, in the language of the conclusion of law mentioned, "that the contract . . . was fully executed by the plaintiffs on the 10th day of July, 1900," the day on which, by its terms, it was to go into effect, notwithstanding the findings of fact that the defendant's cards were to be so inserted in cars by the plaintiffs "for the term of twelve months from July 10, 1900." Other stipulations in the contract show that the services of the plaintiffs were to continue for the whole year; and the com-

plaint alleges, and the court found, that such services did so continue from June 19, 1900, "up to and including the 10th day of July, 1901." Such finding would seem to be conclusive that at the time the defendant directed the plaintiffs "to remove from all cars their cards which had been inserted pursuant to the terms of the contract"—September 27, 1900—the contract was still executory for the balance of the year.

But the plaintiffs further contend that the contract was fully executed July 10, 1900, because prior to that date they had procured the insertion of the requisite number of cards in the cars of the two railways as agreed, and that, by the terms of the contract, "nonuse of space from advertiser's act or omission is advertiser's loss," and hence it is argued that the defendant was bound by the contract to pay for the spaces so procured by the plaintiffs, whether the defendant used them or not. The argument is plausible; but the real question is whether the nature of the contract is such as prevented the defendant from stopping further performance on the part of the plaintiffs by the direction given September 27, 1900, "to remove from all cars their cards," as mentioned. It appears from the evidence that no particular space in particular cars was secured by the plaintiffs. As late as September 10, 1900, they wrote to the defendant as follows: "Please forward us at once 250 cards, size 11x21, as we need same for display in the box cars in Brooklyn which will shortly be placed in service." That request was renewed September 22, 1900, "for a requisite number of cards for equipping the box cars of the Brooklyn Heights Railroad." The defendant, under date of September 24, 1900, replied by stating "that, as we have canceled our advertising with you for the present, you will not need any cards for the box cars of the Brooklyn Heights Railroad. When we renew our cards in your cars later in the fall, we will send new cards enough to cover all of the cars that we will use." These letters ob-

viously have reference to the necessary change from open cars to winter cars. The theory that the plaintiffs had procured such "spaces" from the railways by leases or otherwise, and then re-leased or sublet them to the defendant, cannot be maintained.

"A lease is a contract for the possession and profits of land and tenements on the one side and the recompense of rent or property on the other." 18 Am. & Eng. Ency. of Law (2d ed.) 597.

Here the defendant never had any possession or right to the possession of such cars, or any part of any of them. *Reynolds v. Van Beuren,* 155 N. Y. 120, 123, 49 N. E. 763. The case is peculiar, and it may be difficult to find adjudications in cases where the facts are similar. It has been held in New York:

"A contract whereby one person gives another the authority, for a stated compensation, merely to use a wall of a house for advertising purposes during a specified time, does not constitute a lease, so as to create the relation of landlord and tenant between the parties." *Goldman v. N. Y. Advertising Co.* 60 N. Y. Supp. 275.

So it has been held in Massachusetts:

"An agreement by the lessee of a building to allow a third person, in consideration of an annual payment by him, to place a sign upon the outside wall of the building for a stated time, is not a breach of a covenant in the lease not to underlet any part of the premises." *Lowell v. Strahan,* 145 Mass. 1, 12, 12 N. E. 401.

So it has been held in Maryland:

"A contract to display advertisements in a street car, the cards being subject to the approval of the advertising company," as here, "is one in which the other party relies upon the skill and experience of the company in making such displays, and hence is not assignable by the latter." *Eastern Advertising Co. v. McGaw,* 89 Md. 72, 42 Atl. 923.

In other words, it was there held that the contract was for personal services, and not even a license, much less a lease. We must hold that when the defendant directed the plaintiffs

to remove its cards, September 27, 1900, the contract remained executory for the balance of the year.

6. Being executory, did the defendant have the right, by giving such direction, to stop further performance on the part of the plaintiffs, and limit its further liability to damages sustained for the breach of the contract, as claimed by the defendant? Certainly there are numerous adjudications to that effect. Courts differ as to whether an action can be maintained for such breach before the time for the fulfilment of the agreement expires. *McCall Co. v. Icks,* 107 Wis. 232, 83 N. W. 300; *Hochster v. De La Tour,* 2 Ellis & Bl. 678. But that question is not here involved, since the time for such fulfilment had fully expired when the last action was brought. In the case last cited it was held by the Queen's Bench, Lord CAMPBELL, C. J., presiding, "that a party to an executory agreement may, before the time for executing it, break the agreement either by disabling himself from fulfilling it, or by renouncing the contract." That rule was followed by the supreme court of the United States in a learned and discriminating opinion by FULLER, C. J., reviewing the English and American cases, and it was there, among other things, held that:

"After the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damages he has suffered from the breach of it. . . . The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. As to the question of damages, when the action is not premature, the plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself." *Roehm v. Horst,* 178 U. S. 1, 20 Sup. Ct. 780.

So in an early case in New York the party who had employed another person to do certain mechanical work at a price agreed upon, after the work had been commenced countermanded his directions and forbade the person so employed to further execute the work; and it was held that the person so employed had no right to proceed with the work after he was so forbidden. *Clark v. Marsiglia,* 1 Denio, 317; *American L. Ins. Co. v. McAden,* 109 Pa. St. 399, 1 Atl. 256. So it has been held in Vermont, that:

"In executory contracts a party has the power to stop the performance on the other side by an explicit order to that effect, by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the contract." *Danforth v. Walker,* 37 Vt. 240, followed in *Davis v. Bronson,* 2 N. D. 300, 303, 304, 50 N. W. 836; *Gibbons v. Bente,* 51 Minn. 500, 53 N. W. 756, 22 L. R. A. 80.

In such cases it is held that an action cannot be maintained to recover the contract price, but may be maintained to recover damages for the breach of the contract. *Hamilton v. McPherson,* 28 N. Y. 72, 76, 77; *Butler v. Butler,* 77 N. Y. 472; *Johnson v. Meeker,* 96 N. Y. 93, 97; *McMaster v. State,* 108 N. Y. 542, 15 N. E. 417; *Hinckley v. Pittsburg B. S. Co.* 121 U. S. 264, 7 Sup. Ct. 875. And yet in such an action the party seeking to recover for the breach of the contract is in duty bound to make reasonable exertions to keep down the damages. Id. See, also, *Roper v. Johnson,* L. R. 8 C. P. C. 167; *Brown v. Muller,* L. R. 7 Exch. Cas. 319, 23 E. R. C. 527–530, and notes.

7. But this is not an action to recover damages by reason of such breach of contract. As indicated, this is an action to recover the contract price on the theory of full performance. Such is the only cause of action alleged in the complaint. True, some evidence was admitted having a bearing upon such question of damages, but such evidence was so admitted against objections that it was inadmissible under the

pleadings. As the breach of the contract is the gist of such an action, it is necessary that the complaint allege the particular breach; otherwise it will be demurrable. A failure to allege such breach cannot be cured, even by verdict. This is elementary. 4 Ency. Pl. & Pr. 937, 938, citing numerous cases; Abbott's Trial Ev. (2d ed.) 634, and cases there cited. In such cases the plaintiff is not entitled to prove a breach of contract not alleged, nor damages of a kind not necessarily resulting from the breach of contract alleged and proved, unless they are specifically stated in the complaint. Id. Thus it is stated in one of the works cited:

"The damages to be recovered upon an alleged breach of contract need not be averred where they are the necessary result of the breach complained of, but a full recovery may be had under the general allegation of damages in the complaint." 5 Ency. Pl. & Pr. 739.

"On the other hand, where the damages do not necessarily result from the breach of the contract alleged, they must be specially pleaded, in order that the defendant may not be taken by surprise at the trial. And in case such damages are not specially pleaded, in accordance with this rule, evidence in regard thereto will be excluded at the trial, and the plaintiff will be confined to his general damages." Id. 741–743.

It follows from what has been said that so much of the thirteenth findings as bears upon such damages and is based upon such improper evidence must be disregarded. The damages thus referred to, of course, only include such, if any, as the plaintiffs may have sustained by reason of their being prevented by the defendant from performing the balance of the contract.

8. But the plaintiffs had fully performed the contract on their part for two months and seventeen days before the defendant directed them to remove its cards from the street cars in question. For such partial performance they are certainly entitled to recover the contract price. The price so

stipulated in the contract is $470 per month, to be paid at the end of each month. There is nothing in the contract that can authorize a division of such monthly instalment. The result is that the plaintiffs are entitled to recover only three monthly instalments under the contract, with interest on each instalment from the time it became payable by the terms of the contract. For the aggregate amount of such instalments and interest they are entitled to judgment in this action.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to enter judgment in favor of the plaintiffs and against the defendant for the amount indicated in this opinion.

CASSODAY, C. J. When this case was decided, May 20, 1903, the question as to the amount of costs which the plaintiffs were entitled to recover was considered by the court, and it was then held that the plaintiffs were only entitled to recover such costs as were allowable under the statutes in actions at law on contract. The failure to consider the question in the opinion filed was the fault of the writer.

FISCHBECK, Respondent, vs. MIELENZ, Appellant.

May 11—September 8, 1903.

Appeal: Insufficient findings: Further trial: Assignment of judgments partly satisfied: Rights of assignee: Liens: Voluntary assignment: Withdrawal of claim: Res judicata.

1. Where facts essential to the determination of the rights of the parties have not been found by the trial court and cannot be ascertained from the record on appeal, the cause will be remanded for further trial and findings as to such facts.
2. Upon an execution sale the judgment creditor, a bank, bid in personal property for less than the amount of the judgments, and agreed with the debtor that, after satisfying the indebtedness from the proceeds of such property, it would return any surplus to him. Afterwards, having realized from the property a sum nearly equal to its demand, the bank turned the

remainder of the property over to one M., and assigned the judgments to him, upon his paying a certain sum. M. was acting for the judgment debtor. In a controversy between M. and one upon whose land the judgments were liens, it is *held* that M. merely succeeded to the rights of the bank and was accountable accordingly, and that the judgments were enforceable in his hands only for the balance due thereon over and above what had been realized by the bank from the personal property.

3. The withdrawal of a claim presented in assignment proceedings, and entry of an order or judgment to the effect that the claim was withdrawn and all proceedings thereon dismissed,—the merits of the claim not being passed upon,—is in the nature of a voluntary nonsuit, and the matter of such claim does not thereby become *res judicata* against the claimant.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This is an action for the partition of the premises described, of which Fred Roth owned the undivided one-fourth interest from April 30, 1895, to August 28, 1896. The controversy here is between the defendant *Mielenz,* to whom five of the judgments hereinafter mentioned were assigned by the bank, as hereinafter stated, and who filed an answer to the cross-complaint of the defendant *Fischbeck,* who has become the owner of Roth's one-fourth interest in the land in question.

It appears from the record, and, among other things, is found, in effect, by the court, that on the day and year last mentioned the Marshall & Ilsley Bank entered by confession six several judgments against Fred Roth in the aggregate amount of more than $12,000, and each of them was duly docketed on that day; that executions were immediately issued thereon, and levied on all and singular the visible and tangible personal property of Fred Roth, including a large stock of machinery, tools, tubs, vats, merchandise, and materials used in the pickle and vinegar factory; that the prop-

erty so levied upon was bid in on the execution sale by the bank for $3,000. After the confession and docketing of said judgments, and on August 28, 1896, Fred Roth made a voluntary assignment for the benefit of his creditors of all of his property, including the land in question, to one Phillip G. Hinners, who, as such assignee, duly sold and conveyed the land in question to August Richter, Jr., April 3, 1897, and that sale and conveyance was duly confirmed by the court May 11, 1897, and subsequently Richter sold and conveyed the land in question to the defendant *Olga Fischbeck*. When the bank bid in the personal property on execution sale, as mentioned, it engaged the services and special skill of Fred Roth to cure, finish, and market the merchandise and stock on hand, a large portion whereof was then still in process of manufacturing or ripening, and it agreed to pay Roth for such service in cash $100 per month and to turn over to him or his order all the surplus, after realizing the amount of the bank's claim or investment, with interest and such costs or expenses as it might incur. Roth acted upon this undertaking, and gave his personal service and attention to finishing and marketing the product. By June 28, 1897, there had been realized from the sale of such personal property in the ordinary course of trade a sum *nearly equal to the bank's demand*, while considerable material, as well as machinery, tools, vats, etc., still remained on hand and undisposed of; and then and there, in consideration of the payment of $400, the bank turned over the rest, residue, and remainder of all property bid in at the execution sale to the defendant *Mielenz*, agreeing to assign to him upon demand the several judgments against Fred Roth, which then stood of record still uncanceled. *Mielenz* was a relative of Roth, and acted in said transaction not for himself, but for the benefit of Fred Roth, and, after Roth's death later on, for the benefit of Roth's family. The bank did assign all its right, title, and interest in and to five of said judgments to *Mielenz* July 10, 1900,

reciting therein a consideration of $1, but gave to *Mielenz* a receipt therefor, of even date, for $400.

On December 9, 1896, the bank, acting under the instructions of *Mielenz,* presented and filed its claim in the matter of the assignment of Roth for the benefit of his creditors, asking to participate in the distribution of a dividend then about to be declared to the extent of the unpaid balance then appearing to be still due on its several judgments, and which the bank then claimed to amount in the aggregate to $9,349.66 and interest. The assignee, Hinners, objected to such claim on the ground, among others, that under the arrangement mentioned said judgments had been paid in full and that there was nothing any longer due from Fred Roth to the bank. The issue thus raised was referred for trial, and a great deal of testimony taken, upon which the referee decided in favor of the bank, holding it to be entitled to participate to the extent of its judgment claims. Upon the hearing of the referee's report before the circuit court the bank moved for a confirmation of the findings of the referee, and Hinners moved to set aside the same. The court thereupon refused to confirm such report, and ordered a re-reference, and further testimony to be taken, for the purpose of taking proofs as to what disposition had been made by the bank of the property which was bid in and purchased upon execution sale, the manner of such disposition, and the sums or amounts realized therefor either in cash or outstanding accounts, and that such re-reference be, and thereby was, confined solely to the particulars above mentioned. Pending such proceedings the bank withdrew its claim, and thereupon, and on November 6, 1898, the court entered its order and judgment that the claim of the bank filed therein be, and the same was thereby, withdrawn, and all proceedings had thereon on the part of the bank be, and they thereby were, dismissed, with costs in favor of Hinners, to be taxed by the clerk of the court. No

further proceedings were ever had to enforce said judgment claims.

Upon such facts the court found as conclusions of law that from and after June 28, 1897, there was nothing any longer due and owing upon said several judgments from Fred Roth by reason of the dealings between the bank and the judgment debtor; that *Mielenz,* in procuring an assignment of such judgments, was a naked trustee for Roth and his family, and that the same ought to be released and canceled of record, because not any longer constituting either a legal or equitable lien upon the one-fourth undivided interest in the premises described, and now owned by the defendant *Fischbeck.* It was further found by the court that the bank held as collateral security for the indebtedness covered by such judgments a second mortgage on lands in the Second and Fourth Wards of Milwaukee, the value of which was greatly in excess of the aggregate indebtedness secured by both of such mortgages; that August 15, 1896, the bank allowed the land known as the "vinegar factory property," in the Fourth Ward, to be sold on such first mortgage for much less than it was intrinsically worth, without the slightest effort on the part of the bank to bid in the same or to compete as a subsequent incumbrancer at the sale thereof; and that August 31, 1897, the bank, without any consideration, and upon the mere request of *Mielenz,* acknowledged part satisfaction and release of record of its second mortgage upon the Roth homestead, to enable the owners thereof to sell the same. Upon such findings the court, among other things, adjudged that the defendant *Albert E. Mielenz* had no claim or lien, legal or equitable, upon the undivided one-fourth interest belonging to the defendant *Fischbeck,* and that his cross-complaint [answer] in that behalf ought to be dismissed, with costs in her favor. From such judgment the defendant *Mielenz* brings this appeal.

For the appellant there was a brief by *Wheeler & Perry*, and oral argument by *C. G. Wheeler*.

For the respondent there was a brief by *Sylvester, Scheiber & Orth*, and oral argument by *F. W. Cotzhausen*.

CASSODAY, C. J. It is conceded that the five judgments against Roth and in favor of the bank became liens upon Roth's quarter interest in the land in question August 28, 1896. The important question is whether those judgments were fully paid by the agreements and dealings between the bank and Roth and the bank and *Mielenz*, who acted, not for himself, but for the benefit of Roth during his life, and after his death for the benefit of Roth's family, in respect to Roth's property and services and the judgments. The agreement with Roth, as found by the court, was that, after the bank should realize the amount of its claim or investment, with interest, costs, and expenses, "all the surplus" or balance of the property should be turned over to Roth or his order. The court found that as early as June 28, 1897, the bank had "realized from the sale of such personalty, in the ordinary course of trade, a sum *nearly equal to the bank's demand*," while there "still remained on hand and undisposed of" "considerable material, as well as machinery, tools, vats, etc." But the court fails to find just how much of the bank's demand so remained unpaid at that time, or the value of the property then remaining on hand and undisposed of. Under such circumstances the bank, on the day and year last mentioned, turned over to *Mielenz* all the rest, residue, and remainder of the personal property it had bid in at execution sale, and also agreed "to assign to him upon demand the several judgments" mentioned, in consideration of $400 then paid by *Mielenz* to the bank. Of course, the property received by him at the time must have been regarded as of equal value, at least, to the $400 so paid. The vice president of the bank, who conducted the principal negotiations with

Roth, testified to the effect that all the bank wanted was to get enough out of the property to pay Roth's indebtedness to the bank; that, if there was anything left, the bank was willing to turn it over to Roth, or to anybody he might name; that the bank did not agree to satisfy any judgment, but simply agreed that, if the bank should get enough to pay its debt against Roth, whatever there was left Roth could have for himself, his wife, or his friends; that the bank "agreed to satisfy the debt simply." He also testified, under sec. 4096, to the effect that the bank received out of the property so taken on execution $11,492.93 net, and that that left a balance of principal due of $507.07, and that to that sum should be added $502.51 interest and certain expenses. It is obvious from the evidence, as well as the findings of the court, that the bank made the agreements and acted as mentioned in good faith, and for the purpose of allowing Roth and his family to have the benefit of all sales of the property and all the property over and above what was necessary to satisfy its indebtedness against Roth. The bank only claimed, and *Mielenz,* as the assignee of the bank, is only entitled to recover, the balance of such indebtedness to the bank over and above what had been realized or received from the property. It is impossible to tell from the record just the amount due the bank, upon a fair accounting, at the time the property was so transferred to *Mielenz;* and the court made no finding on the question, except as stated. The trial court is the appropriate place for the determination of such questions. The result is that there must be further trial and findings of the court on that question. *Brown v. Griswold,* 109 Wis. 275, 280, 85 N. W. 363; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 92 N. W. 246, 259; *Kinn v. First Nat. Bank,* 118 Wis. 537, 95 N. W. 969.

2. In view of the findings and evidence mentioned and what has been said, it is hardly necessary to say that the contention to the effect that by the transfer and assignment men-

tioned the indebtedness secured by the judgments, and which had been so nearly paid and satisfied, was thereby revived and made enforceable for the full amount of $12,000 and interest, less the $3,000 which the bank bid in the property for at the execution sale, is without foundation. By such transfers and assignment *Mielenz* was placed in the position of the bank, and accountable accordingly; but he thereby occupied no better position and secured no superior rights. It is elementary that "the assignee of a chose in action succeeds to all the rights of the assignor, and these rights, whether legal or equitable, will be recognized and protected by courts of law against all persons having notice of the assignment." 2 Am. & Eng Ency. of Law (2d ed.) 1088. This court has repeatedly held that the assignee of a judgment or chose in action takes it subject to all the equities between the parties. *Blakesley v. Johnson,* 13 Wis. 530; *Rockwell v. Daniels,* 4 Wis. 432.

3. It is claimed on the part of *Fischbeck* that the presentation of the claim secured by the judgments in the assignment proceedings, the favorable report thereon by the referee, the refusal of the court to confirm such report, and the rereference thereof, and the withdrawal of such claim pending such proceedings, and the entry of an order and judgment therein to the effect that such claim was thereby withdrawn and all proceedings had thereon on the part of the bank be and were thereby dismissed, with costs, should be regarded as *res adjudicata* against the bank and *Mielenz,* as its assignee. Such is not the law. It will be observed that the merits of the claim were not passed upon, much less determined. In such determination a jury trial was, in the discretion of the court, permissible. No "final hearing" or order was ever made thereon. Sec. 1699, Stats. 1898. The withdrawal of the claim simply prevented participation in the estate assigned. Sec. 1700, Stats. 1898. While the administration of insolvent estates is to a certain extent governed by equi-

table principles, yet the mere allowance or disallowance of a claim is in the nature of a legal action. *In re Sherry,* 101 Wis. 11, 16, 17, 76 N. W. 611; *Nat. Bank v. Herman,* 114 Wis. 582, 91 N. W. 112. The withdrawal of such claim is in the nature of a voluntary nonsuit. Thus it has been held that a judgment is not *res adjudicata* as to defendants against whom the action was discontinued before verdict. *Newell v. Smith,* 38 Wis. 39. See, also, *Morse v. Stockman,* 65 Wis. 36, 26 N. W. 176. Nor where a judgment of dismissal is entered upon a mere stipulation to dismiss. *Bishop v. McGillis,* 82 Wis. 120, 51 N. W. 1075. Even in equitable actions, where the dismissal is not upon the merits, it does not operate as a bar. *Spear v. Door Co.* 65 Wis. 298, 27 N. W. 60; *Richards v. Allis,* 82 Wis. 509, 52 N. W. 593. We must hold that the withdrawal of the claim and the action of the court thereon was not *res adjudicata.*

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for further trial and findings as mentioned in this opinion, and for further proceedings according to law.

GAVITT, Respondent, vs. MOULTON, Appellant.

May 13—September 8, 1903.

Wills: Testamentary capacity: Undue influence: Loss or destruction: Evidence.

1. In a proceeding for the establishment and probate of a will which had been lost or destroyed, the evidence (stated in the opinion) is *held* sufficient to sustain a finding that the testator was of sound mind at the time the will was executed.
2. A will made no provision for the wife of the testator, to whom he had been married about a year before, when he was eighty-one years old, and from whom he had been estranged. It gave the bulk of his property to Mr. and Mrs. G., with whom he had

long been on terms of intimate friendship, and the balance to his nieces and nephew. Upon a contest by the wife it appeared, among other things, that, on hearing of testator's illness, G. had come from Chicago to see him the day before the will was executed, and that testator's wife and the nurse were excluded from the room when the will was executed. There was no evidence that G. exerted or attempted to exert any influence over the testator to induce him to make the will, and the undisputed evidence showed that the will expressed the wishes of the testator at that time. G. returned to his home in Chicago, and the testator lived nearly two years thereafter without revoking or changing the will. *Held*, that a finding that the testator was not, at the time of making the will, under the undue influence of G. or any other person, was sustained by the evidence.

3. Where a will was last known to be in the possession of the testator and cannot be found upon his death, the presumption is that he destroyed it with the intention of revoking it.
4. The mere fact that the contestant in such case had an opportunity to destroy the will is not, of itself, sufficient to overcome the presumption that the testator destroyed it with intent to revoke it, but it is a circumstance to be considered with other proof.
5. Declarations of the testator showing that he believed he had possession of his will up to a time shortly before his death are admissible as tending to show that the will had been lost by accident or destroyed by the design of others.
6. The evidence in this case—including such declarations of the testator and showing, among other things that the contestant, testator's wife, from whom he was entranged and for whom no provision was made in the will, had access to his rooms and papers for several days before his death, while he was unconscious; that such papers were scattered about; and that immediately after his death she carried away a part of such papers, and refused to return them until compelled to do so—is *held* to sustain a finding to the effect that the will had been lost by accident or destroyed by design of some person other than the testator.

APPEAL from a judgment of the circuit court for Green Lake county: GEORGE W. BURNELL, Circuit Judge. *Affirmed.*

On August 1, 1900, *George Gavitt* presented to the county court for Green Lake county his verified petition stating, in

effect, that H. C. Moulton, of Berlin, in that county, died July 8, 1900, leaving an estate therein to be administered; that the deceased left no children him surviving and was never married; that he left the five persons therein named as next of kin and heirs at law of the said estate as therein mentioned; that the deceased left a will (the substance of which is therein stated), duly executed on or about September 12, 1898, which will was therewith presented and propounded as his last will and testament by the petitioner as the executor named therein; that said will was lost or destroyed by design in the manner and under the circumstances therein stated; that one *Anna Bachlinsky* (*Moulton*), claiming to be the widow of the testator, as therein charged, in effect, destroyed the will after the death of the testator; that one H. R. Laing was appointed special administrator of said estate July 20, 1900, on the petition of this petitioner; that Laing thereupon demanded all papers belonging to the estate of and from the said *Anna,* but failed to get such will; that at the time of the death of the testator there was pending in the circuit court an action brought by him against said *Anna* to cancel an alleged fraudulent marriage certificate and the record of such marriage certificate; that the testator ordered said *Anna,* who was a person of ill repute, from his premises, and did what he could to keep her therefrom, and had her expelled by process of law and arrest; and said petition prayed that proof of the contents of the will be taken, and the same proved and allowed as the last will and testament of said deceased, and letters testamentary thereupon be issued to said petitioner. Such proceedings were had upon such petition that an order, judgment, and decree was duly entered in the county court December 3, 1901, establishing, allowing, and admitting to probate such written instrument as the last will and testament of said deceased, and thereupon, and on December 12, 1901, the said *Anna* duly appealed therefrom to the circuit court.

The cause was thereupon tried in that court without a jury, and after the close of the trial and due consideration the court, on June 10, 1902, made and filed its findings, wherein it was found as matters of fact, in effect, (1) that H. C. Moulton died at the city of Berlin July 8, 1900; (2) that he was then an inhabitant and resident of that city, (3) and of full age and of sound mind; (4) that on or about September 10, 1898, at the city of Berlin, the said H. C. Moulton made and signed his will in writing in the form and manner provided by law; (5) that said instrument and will was at the time—September 10, 1898—duly attested and subscribed by Perry Niskern, B. F. Dodson, and Bert Wood, who were competent witnesses thereto, in the presence of the said H. C. Moulton and in the presence of each other, and the said H. C. Moulton at the time declared the same to be his will, and requested said witnesses above named to subscribe the same as subscribing witnesses; (6) and the same was in all things duly executed by the said H. C. Moulton as his last will and testament; (7) that he was not at the time under the undue influence of the proponent, *George Gavitt,* or any other person or persons, and that said will was so made and executed by him, the said testator, freely and voluntarily of his own motion, and was the expression of his own mind and will and desire; (8) that said will was never revoked, and was either lost by accident or destroyed fraudulently by design or fraudulently suppressed by some other person than the said H. C. Moulton previous or subsequent to the decease of the said H. C. Moulton; (9) that said will was last seen in the possession of the testator a short time and within about a month prior to his decease; (10) that the said H. C. Moulton was upwards of eighty years of age, careless in keeping his papers, and that just before his death he became unconscious, and so remained for several days prior to his death; (11) that during the time he was so unconscious the said *Anna,* claiming to be the wife of the said H. C. Moulton, had access to

his papers and the rooms where he was then lying unconscious, and that the papers were then in a scattered condition throughout his room, part of them being on the floor and scattered throughout the room, and that the said *Anna* immediately after his death removed part of said papers of said deceased from his rooms, and refused to return them to the special administrator until compelled to do so by direction of her attorney therein after a suit had been begun against her by the said special administrator for that purpose; (12) that not long before his death the said H. C. Moulton had declared to divers persons that his will was so executed as aforesaid, and as to different persons declaring it to be his will, but that on a search of what papers could be found after his death—being papers recovered of the said *Anna*—said will could not be found, and the same appears to have been lost by accident either by the said H. C. Moulton just prior to his death, or to have been soon after his death destroyed by design or concealed by some other person. (13) The court further finds that the provisions of said will were as follows, to wit:

"I, H. C. Moulton, of Berlin, Green Lake County, Wisconsin, make, publish and declare this my last will and testament, hereby revoking all other wills by me made.

"1st. After the payment of my debts and funeral expenses, I give, devise and bequeath to Mrs. Helen Van Kaughnet of Turin, Lewis County, N. Y., the sum of one hundred dollars, to be paid to her out of my estate.

"2d. I give, devise and bequeath to H. C. Moulton Riggs of Turin, Lewis County, N. Y., the sum of one hundred dollars.

"3d. I give, devise and bequeath to Gara Riggs of Turin, Lewis County, N. Y., the sum of one hundred dollars.

"4th. I give, devise and bequeath to Mrs. C. W. Coulton of Booneville, Oneida County, N. Y., the sum of one hundred dollars.

"5th. I give, devise and bequeath to Mrs. Mary Berry of Waukegan, Ill., the sum of one hundred dollars.

"6th. All the rest, residue and remainder of my estate

both real and personal, I give, devise and bequeath to *George Gavitt,* and Miriam Gavitt, his wife, of Chicago, Cook County, Illinois, to be equally divided between them.

"7th. I hereby nominate and appoint *George Gavitt* as the executor of this, my last will, and I ask that no bond be required of him by any court having the probating of the will.

"Whereas, one *Annie Bachinsky* is now claiming to be my wife, I take this occasion to say that I was never married to her or any other woman.

"Witness my hand and seal this 10th day of September, 1898.

"H. C. MOULTON. [Seal.]

"The above instrument consisting of two and one-half pages of legal cap writing was on the day of the date thereof, to wit: Sept. 10, 1898, signed, published and declared by the said testator, H. C. Moulton, in our presence to be his last will and testament, and we at his request and in the presence of each other have subscribed our names thereto as subscribing witnesses.

"PERRY NISKERN.
"B. F. DODSON.
"BERT WOOD."

And as conclusions of law, the court found, in effect, (1) that said will had been duly proved and established as the last will and testament of the said H. C. Moulton, and should be established, allowed, and admitted to probate as such last will and testament of said H. C. Moulton, deceased; (2) that the judgment of the county court should be affirmed in whole, and that the record should be remitted to the county court for further proceedings in the administration and settlement of said estate; (3) that the proponent should recover his costs and disbursements in this proceeding to be taxed, and such judgment for costs be docketed in the office of the clerk of the circuit court, and enforced as the judgment of that court in the manner provided by law.

Thereupon judgment was entered in the circuit court in favor of the proponent, *George Gavitt,* and against the contestant, *Anna Moulton,* in accordance with such findings of

fact and conclusions of law, and for $109.58 costs. From such judgment the said *Anna Moulton* appeals.

For the appellant there was a brief by *Bouck & Hilton,* and oral argument by *Gabe Bouck.*

For the respondent there was a brief by *Perry Niskern,* attorney, and *Thompson, Thompson & Pinkerton,* of counsel, and oral argument by *H. E. Thompson.*

CASSODAY, C. J. The statute gives to the county court "power to take proof of the execution and validity" of "any will of real or personal estate" which has been "lost or destroyed by accident or design," and "to establish the same." Sec. 3791, Stats. 1898. "The petition for the probate of such will" must, however, "set forth the provisions thereof." Id. That was done in the case at bar. "The same power" is thereby given to "the circuit court" "in an action brought for that purpose." Id. Of course, the fact that such will is not in existence and cannot be produced makes it necessary to prove its contents by secondary evidence. *Everitt v. Everitt,* 41 Barb. 385; *Southworth v. Adams,* 11 Biss. 256, 260. Such statute is in aid of the common law, and the proof of such contents may be made as at common law. *Harris v. Harris,* 26 N. Y. 433; *In re Kennedy's Will,* 167 N. Y. 172, 60 N. E. 442; 19 Am. & Eng. Ency. of Law, 563; *Hall v. Allen,* 31 Wis. 691. There is no question here but that the contents of the will were sufficiently proved. The attorney who drew it testified to its contents substantially as found by the court. His testimony is corroborated to some extent by the testimony of each of the other subscribing witnesses. So the formal execution of the will is sufficiently proved, and seems to be conceded. The probate of the will, however, is contested on three grounds. To appreciate the questions presented, a general outline of the situation seems to be necessary.

The testator had resided in Berlin for many years as a

bachelor. He occupied three rooms over a store. When he was well he took his meals at the hotel, and when he was sick, or did not feel well, his meals were brought to him. His principal business was loaning money on mortgage security, shaving notes, etc. He had no blood relatives nearer than nephews and nieces, and they lived in New York and Illinois. The contestant, *Anna,* had been married to one Bachinsky several years ago, but was divorced from him some nine or ten years before the trial of this action, and he subsequently died. After the divorce she returned to Berlin, where she formerly lived. Mr. Moulton kept company with her before she was married to Bachinsky, and again and for several years after her divorce. During that time, or a portion of it, she lived in a house belonging to Mr. Moulton. September 20, 1897, they were married by a justice of the peace in Milwaukee county, who issued his certificate to that effect, with two subscribing witnesses. At the time of such marriage Mr. Moulton was over eighty-one years of age. After such marriage she continued to occupy the house, the same as before, and he continued to occupy the rooms over the store, the same as before; but he made frequent visits to her at the house, and she visited him at the rooms. A little more than a month after such marriage, and on October 25, 1897, Mr. Moulton made his will, thereby purporting to give all his property to "his beloved wife," *Anna.* It appears that September 7, 1898, Mr. Moulton had an attack of apoplexy, and became unconscious for a little time; that on September 9, 1898, his mind was still in a dazed condition, but he was better—not unconscious—and became clear-headed, but remained in bed, although he was able to talk and take nourishment and answer questions put to him. That was on September 9, 1898. On September 10, 1898, he was up all day, or the most of the day, and his mind was sound during that day. On that day he sent for his attorney, who went to Mr. Moulton's rooms and found him there, up and dressed, sitting

in a chair in the middle of the room; that he pointed to *Anna*, who was also there, and said she was claiming to be his wife, and it was all wrong, and he wanted him to get her out at once, and thereupon Mr. Moulton made an affidavit before a court commissioner for the arrest of *Anna* for unlawfully and wrongfully and by force and arms breaking into his rooms and doing damage therein. On that same day he requested his attorney to draw his will, saying to him that he wanted to leave some small legacies to different persons whose names he would furnish, and the balance of his estate he proposed to give to *Mr. George Gavitt* and his wife. The attorney subsequently received the memorandum in evidence, and drew the will, and the same was executed, as found by the trial court, about 5 o'clock on the afternoon of that day. As indicated in the foregoing statement, that will contains this clause:

"Whereas, one *Anna Bachinsky* is now claiming to be my wife, I take this occasion to say that I was never married to her or any other woman."

On October 8, 1898, *Anna* filed her verified petition for the appointment of a guardian for Mr. Moulton by reason of his alleged incompetency to do business. October 28, 1898, Mr. Moulton commenced an action against *Anna* to set aside and cancel the marriage certificate mentioned, and the record thereof, made September 29, 1898. The contestant, *Anna*, answered the complaint in that action, and alleged, among other things, that whatever secrecy there had been in respect to such marriage had been at the request of Mr. Moulton. That cause was still pending when Mr. Moulton died.

It appears that after the will was so executed, and on September 13, 1898, the attorney who drew it sealed it up in an envelope and indorsed thereon, "The last will of H. C. Moulton," and filed the same in the county court. August 14, 1899, Mr. Moulton withdrew the will from the county court, and told the attorney that he wanted to keep the will, but no

person ever saw the will itself afterwards. In November or December, 1899, Moulton showed the attorney the sealed envelope with the indorsement thereon—showed it to him several times. January 24, 1900, Moulton and another made a very thorough search for the will through the safe, the green box, the secretary, and papers, but could not find it. Moulton thereupon told his attorney that he had lost the will, and wanted him to draw another will like the former will, and stated the substance of it; but afterwards, and in April or May, 1900, Moulton told his attorney that he had found the will, and again showed him the envelope said to contain the will. After the execution of his will and until he died he remained feeble. July 3, 1900, Mr. Moulton was again taken sick. He was nervous, his right arm hanging down by his side, and he remained in a comatose condition until he died July 8, 1900. It appears from the inventory of the special administrator that the value of the whole estate was less than $7,000.

The probate of the will is contested upon three grounds:

1. Want of mental capacity on the part of H. C. Moulton to make a valid will at the time the will in question was executed. The requisite mental capacity to make a valid will has frequently and recently been stated by this court. *In re Downing's Will,* 118 Wis. 581, 95 N. W. 876, 879. A restatement of one quotation there made is sufficient for the present purpose.

"It is essential that the testator has sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were or should or might have been the objects of his bounty, and the scope and bearing of the provisions of his will." Id.

The undisputed evidence in the case at bar brings it within the rule stated. The testator sent for his attorney, and directed him to do certain things in respect to the contestant, *Anna,* mentioned in the foregoing statement of facts, and

thereafter told him that he wanted his will drawn; "that he wanted to leave some small legacies to different people," but that he could not just then state their names, "and the balance of his estate he proposed to give to *Mr. George Gavitt* and his wife," and that he would give him "instructions as to the names later," and he did; and the attorney drew the will "in accordance with his instructions, and in accordance with the names so far as they were concerned." After the will was so drawn, the attorney read it over to Mr. Moulton in the presence of the other two subscribing witnesses, and he expressed himself as being satisfied with it, and that it was all right, and declared that it was his will, and signed the same in their presence, and requested the subscribing witnesses, including the attending physician, to subscribe their names thereto as such witnesses, which they did in his presence and in the presence of each other. All three of the subscribing witnesses testified that, in their opinion, Mr. Moulton was at the time of executing the will of sound mind; and the testimony of the attorney who drew the will, as to its contents, was corroborated to some extent by the other two subscribing witnesses. Counsel for the contestant virtually concede that the evidence is sufficient to sustain the finding of the court that Mr. Moulton was of sound mind at the time of executing the will.

2. Nevertheless, counsel very properly contend that his weakened mental and physical condition should be considered in determining whether the will was procured by fraud and undue influence. As indicated by the facts stated, the circumstances were peculiar. He was an old man with no blood relations nearer than nephews and nieces, and they lived far from him. His relations with the contestant, *Anna*, were peculiar and unnatural. The evidence is to the effect that he was married to her at the time and place stated. But they continued to live separately, occupying different buildings, the same as before, and continued frequently to visit

each other the same as before. The contestant concedes that the marriage had been kept secret at the request of Mr. Moulton. Manifestly, he became estranged from her prior to the execution of the will; and, as indicated in the statement, he forced her from his rooms, and took steps to have her arrested. That fact, and the fact that the nurse was excluded from the room when the will was executed, is referred to as evidence tending to prove undue influence. Regarding her as the wife of the testator, as we must on the evidence before us, still he had the legal right to make a will and leave her out. The important question is whether she was left out of the will by reason of fraud or undue influence practiced upon him by any person or persons. Was it by reason of importunities or flatteries which he was unable to resist? None of the subscribing witnesses were in any way interested in the particular disposition he should make of his property. The nurse who was excluded from the room had no interest in it. The mere fact that knowledge of the contents of the will was confined to the subscribing witnesses is no evidence that it was procured by undue influence. *Vance v. Davis,* 118 Wis. 548, 95 N. W. 939, and cases there cited. Seemingly, there was no one near Mr. Moulton who could have had any motive to influence him to make the will in question, except *Mr. Gavitt.* He was no stranger to Mr. Moulton. They had known each other intimately ever since *Gavitt's* marriage thirty years prior to the trial of this action. *Gavitt* and his wife lived for many years in Berlin prior to 1886, and in that year moved to Chicago. Moulton had known Mrs. Gavitt ever since she was a small girl. While *Gavitt* lived in Berlin, their places of business were opposite each other, and Mr. Moulton would visit *Gavitt's* every day or evening. After *Gavitt* moved to Chicago, they kept up correspondence, and at one time, and during the World's Fair, Moulton went to Chicago and visited at *Gavitt's* for a week. They had business relations for twenty years. Less than a month before he

died, Mr. Moulton wrote to *Mr. Gavitt* as his "Dear Cousin George," thanking him a thousand times for a letter received a few days before, and telling him about his feeble condition, and closing with these words: "Please inform me the time or about the time you will again visit our Berlin friends. With brotherly love to yourself and cousin Minnie [Mrs. Gavitt] I am respectfully your cousin, H. C. MOULTON." Friendly letters from Mr. Moulton to his nieces named in the will are also in evidence. *Mr. Gavitt* arrived in Berlin on the evening before the will was drawn, by reason of a long-distance telephone from a brother of the subscribing witness Wood, announcing that Mr. Moulton was sick and they would like to have him come up. There is nothing strange or unnatural in the fact of his going to Berlin at that time, and there is no evidence that he exerted or attempted to exert any influence over Mr. Moulton to induce him to make the will in question; much less any undue influence. This court has defined "undue influence in such a case" as "such an influence that the instrument is not properly an expression of the will of the testator in regard to the disposition of his property, but rather an expression of the will of another person" (*In re Jackman's Will,* 26 Wis. 104); and that "motives of natural affection and gratitude on the part of the testator," even when accompanied by "solicitations or arguments which appeal to such motives, do not constitute undue influence" (Id.; *Deck v. Deck,* 106 Wis. 472, 473, 82 N. W. 293).

"To establish undue influence sufficient to invalidate a will, it must be shown that the will of the testator was coerced into doing that which he did not desire to do." *Wingrove v. Wingrove,* L. R. 11 Prob. Div. 81.

So long as the will truly expresses the wishes of the testator, there is no ground for claiming that it was procured by undue influence. Here it appears from the undisputed evidence that the will did express the wishes of the testator at the time it was executed. Three days prior to that time he

had had an attack of apoplexy, and had been for a time unconscious. He naturally realized the seriousness of his condition and the necessity of preparing for the result likely to follow. His feelings towards the contestant—*Anna*—had manifestly changed. Affection, or even friendship, had been superseded by hostility. To whom would he naturally leave his property under such circumstances? There is certainly nothing strange in the fact of his giving the bulk of his property to his particular friends *Mr.* and Mrs. Gavitt, and the balance to his nieces and nephew. He lived nearly two years after the execution of the will in question. If the will had in fact been procured by undue influence, then he would naturally have changed or revoked the will after such influence had been withdrawn or removed. *Gavitt* did not remain in Berlin after the execution of the will, but returned to his home in Chicago. If the will was not changed or revoked during that time, then it may be fairly inferred that it did truly express the wishes of Mr. Moulton when executed. We must hold that the finding of the court that the testator was not under the undue influence of *Gavitt* or any other person at the time the will was executed is sustained by the evidence.

3. The remaining question to be considered is whether the will was revoked by the testator. There is no pretense that it was ever revoked by any other will, codicil, or writing executed in the manner prescribed by statute. Sec. 2290, Stats. 1898. That section of the statute provides that a will may be revoked "by burning, tearing, canceling or obliterating the same, *with the intention* of revoking it, by the testator or by some person in his presence and by his direction." There is no direct evidence that the will in question was ever burned, torn, canceled, or obliterated at all, much less that any such act was done to the will by the testator "with the *intention* of revoking it," or by any "person in his presence and by his direction." Counsel for the contestant contend that where, as here, it is established that the will was last known to be in

the possession of the testator, and could not be found upon his death, it raised a *prima facie* presumption that he destroyed it with the intention of revoking it, and that the burden of doing away with such presumption was upon the proponent. The proponent concedes such to be the law; and it undoubtedly is the law. "Upon this proposition the question is," as stated by counsel for the contestant, "Does the evidence of the proponent do away with this *prima facie* presumption?" The will was in the custody of the county judge from the time it was placed there for safe-keeping by the attorney who drew it, September 13, 1898, until it was withdrawn therefrom by the testator, August 14, 1899. During those eleven months there is no pretense that he revoked it, or attempted to revoke it, or desired to revoke it. During that time he was apparently satisfied with the disposition which the will made of his property. There is no evidence that any one but the testator had the custody of the will after it was so withdrawn from the county judge. The testator lived about eleven months after the will was so withdrawn. The substance of the ninth, tenth, eleventh, and twelfth findings of fact are given in the statement. It appears from them that the testator was careless in keeping his papers; that he remained unconscious for several days immediately before his death; that the contestant had access to his rooms and papers while he was so unconscious; that the papers were then in a scattered condition throughout his room; that immediately after his death the contestant removed part of such papers from his rooms, and refused to return them until compelled to do so; that not long before his death the testator declared to divers different persons that his will was executed as stated and was still his will; and the court further found as a fact that the will had been lost by accident, either by the testator just prior to his death, or had been destroyed by design or concealed by some other person soon after his death. The evidence seems to warrant such findings. True, the mere

fact that the contestant had an opportunity to destroy the will would not of itself overcome the presumption that it was destroyed by the testator with the intent to revoke it; still it is a circumstance to be considered with other proof. Thus it is stated by a standard text-writer that:

"If a will last traced to the testator's custody cannot be found at his death, the presumption that he destroyed it for the purpose of revocation outweighs the probability of its fraudulent and criminal destruction by another when unsupported by any evidence *except that of opportunity,* though this latter circumstance is always worthy of consideration with other proof." Schouler, Wills (2d ed.) § 402.

To the same effect, *Bauskett v. Keitt,* 22 S. C. 187; *Collyer v. Collyer,* 110 N. Y. 481, 18 N. E. 110.

Here there is much more than mere opportunity, as indicated by the facts stated. Besides, the evidence is ample to support the finding that the will was lost by accident. Whether it was lost by accident or destroyed by the design of others would be equally fatal to the contention of the contestant. The conduct and declarations of the testator show pretty clearly that he believed that he had possession of the will up to the time of his death. He showed the sealed envelope in which the will had been placed to his attorney in November or December, 1899. In the following January he missed the will, and on the 24th day of that month he made search for it, but was unable to find it. March 19, 1900, he told his attorney that he had lost his will, and that he would have to make another one just like it; and then stated the substance of the will, and that, if he did not find it, he was going to have it made over again the same way. In April or May he told his attorney that he had found his will, and showed him the sealed envelope in which it had been placed, and again showed it to him about the 1st of June. That such declarations of the testator were admissible on the question of the existence or nonexistence of such last will is abundantly supported by numerous adjudications. *Southworth v. Adams,*

11 Biss. 256, 260; *In re Steinke's Will,* 95 Wis. 121, 70 N. W. 61; *In re Valentine's Will,* 93 Wis. 45, 55, 67 N. W. 12, and cases there cited. In the first of these cases the testator, while stopping with a stepdaughter at Whitewater, made his will, and retained possession of it. He was an old man, and careless about his papers. He resolved to visit relatives in Brooklyn, N. Y., and so bought a ticket and checked his trunk for that place. At the depot in Whitewater, and just before starting, he stated that his will was in his trunk. When he got to Chicago, he suddenly died. His trunk went on, and was finally stopped in Buffalo, and when returned to Chicago it was found to be open. A large open envelope was found therein, marked as containing his will, but no will was found therein nor in the trunk. In a learned and able opinion of Judge DYER, the will was established as a lost will. Among other things, he there said:

"In this class of cases it was at one time somewhat questioned whether secondary evidence of the existence and contents of a will is admissible, and whether the declarations of the testator concerning the will may be shown to establish its contents and the probability or improbability of its destruction by him. It is now, however, fully settled both in England and in this country that such declarations are admissible, and that secondary evidence may be resorted to for the purpose stated."

The other cases cited are to the same effect. Such declarations showed an absence of any intention on the part of the testator to revoke his will. The presumption that he destroyed the will with such intent is fully overcome by the facts and circumstances in evidence. We find no reason for disturbing the judgment.

By the Court.—The judgment of the circuit court is affirmed.

STATE EX REL. DIETRICH and others, Appellant, vs. PATTERSON, City Clerk, Respondent.

February 25—September 29, 1903.

Judgment affirmed upon an equal division of the justices of this court participating in the hearing and decision.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

Mandamus to compel the city clerk of the city of Superior, Wisconsin, to place the names of relators on the official ballot as the regular Republican nominees for the various elective city offices to be filled by election thereto at the spring election of 1902. In the various caucus districts of the city, elections were held in the spring of 1902 for the purpose of choosing delegates to the city convention called for the purpose of placing in nomination candidates for the aforesaid city offices. The result was that seventy-one delegates were duly declared elected, and were duly certified, entitling them severally to participate in the work of the convention if they were in fact legally elected. In the preliminary work of organizing the convention, the right of any delegate not receiving at the primary a majority of all the votes polled, including blank ballots, was challenged. It appeared that of the seventy-one persons claiming the right to sit as members of the convention, twenty received at their caucuses more than half the votes there polled including blank ballots, thirty-one received more than half the votes polled excluding blank ballots, and twenty received only a plurality of the votes polled. The objection did not prevail. Thereupon eighteen delegates, representing seventeen and one-half votes, left the convention, claiming that they were, in the main, the sole parties legally entitled to participate in placing in nomination regular Republican nominees for the coming city election. Those who

remained consisted of the twenty who received a plurality of all the votes cast, twenty-seven, representing twenty-seven and one-half votes, who received a majority of the votes cast excluding blank ballots, and seven who received a majority of all votes cast. Such remaining delegates represented, as indicated, a majority of all who received at their caucuses a majority of all votes there cast excluding blank ballots, but a minority of those who received only a majority including blank ballots. They nominated a full Republican ticket for the spring election, and a political committee for the ensuing year. Those who withdrew organized as the regular Republican convention in a room near the one named in the call for the convention and nominated a full list of candidates to stand as the Republican nominees at the coming city election, and also a political city Republican committee for the ensuing year. Each list of candidates, and each city committee elected as aforesaid, was in due form certified to the city clerk, who, deeming the persons who withdrew as aforesaid to constitute a majority of those who were entitled to participate in the convention, recognized the ticket nominated by them as regular and placed their names upon the official ballot for the coming city election. This proceeding was commenced to compel the clerk to recognize the relators as the persons entitled to be placed upon such ballot as such nominees.

The issue raised and decided in the court below was whether, under ch. 341, Laws of 1899, the word "majority" means a majority of all votes cast at the caucus including blank ballots. The relators' cause depended upon that issue being decided in the negative. The decision was the other way. Judgment was rendered accordingly.

For the relators there was a brief by *T. L. M'Intosh, Louis Hanitch,* and *A. C. Titus,* and oral argument by *H. W. Dietrich.*

Phil. H. Perkins, for the respondent.

MARSHALL, J. This cause was submitted February 25, 1903. There were then but four justices participating in the business of the court. They were equally divided as to the proper judgment to render. The disposition of the matter was delayed only to admit of further investigations, which did not lead to any material change. Since a reversal would not enable appellant to obtain relief, except by way of costs, and ch. 341, Laws of 1899, was amended by ch. 382, Laws of 1903, eliminating the feature which gave rise to the litigation, rendering it unlikely that we shall have upon the same facts the question upon which the cause turned in the court below before us again, it seems best to announce the decision of the court as of the time of the submission, in accordance with what the then situation rendered necessary if acted upon at all.

By the Court.—The judgment appealed from is affirmed upon an equal division of the justices participating in the hearing and decision, the order to that effect to be entered as of the time the cause was submitted, to wit, February 25, 1903.

ILLINOIS TRUST & SAVINGS BANK, Administrator, Respondent, vs. ALEXANDER STEWART LUMBER COMPANY, Appellant.

April 17—September 29, 1903

(1) *Amendment of pleading: Withdrawing admission: Discretion.* (2-9) *Chattel mortgages: Title of parties: Conversion: Sale by mortgagor: Rights of vendee: Subrogation: Application of payments: Confusion of goods.*

1. A question having arisen between the vendee of a chattel mortgagor and the latter's mortgagee as to whether proceeds of the mortgaged property in his hands are subject to the lien of the mortgage, and if so to what extent, and the mortgagee having brought suit to vindicate his claim in that regard,

charging such vendee with liability for money had and received to the amount unpaid upon the mortgage indebtedness, and sometime before suit brought such vendee, upon the order of the mortgagor, having paid the mortgagee a sum of money ostensibly on account of such proceeds, and the parties having joined issue in the action in such form, as to admit that such payment was to apply on such mortgage indebtedness and that the matter in respect thereto was not and would not be a subject of dispute between them, and prior to the trial, which took place several years after the action was commenced and also after issue was joined, in the meantime the plaintiff and the mortgagee, the only person knowing the facts in regard to how the payment came to be applied to an unsecured indebtedness of the latter to the former, as it in fact was, without the consent of such vendee, having been examined under oath in respect to the issues made by the pleadings, the result being such as to confirm the defendant's opinion that there was no controversy and would be none as to such payment having been in fact made upon the mortgage indebtedness, and just prior to the trial the mortgagor, a material witness for the defendant in case of a change of attitude by the plaintiff in respect to whether such payment was made on such indebtedness, having died,—just before the trial was to be entered upon, upon a showing of all such facts, and further that plaintiff's concession as to such payment having been made on the mortgage indebtedness was made upon the faith of information obtained by his attorneys from a written statement furnished by defendant to the plaintiff, but without any claim that the latter was ignorant of the contents of his pleading at any time, the court permitted such pleading to be amended, withdrawing the admission and charging that the payment was made and money applied upon an indebtedness other than that secured by the mortgage: *Held*, while not deciding whether the court's ruling under the circumstances was prejudicial error, a determination thereof being omitted because of its not being vital to the appeal, that the question is one the solution of which in support of such ruling is a matter of serious difficulty.

2. A chattel mortgagee holds the legal title to property involved, qualified by the mortgagor's right to redeem the same at any time before he shall have made default and the property shall have been reduced to the former's possession.

3. A chattel mortgagor in possession is the general owner of the property involved, his ownership resting upon the equitable right to clothe himself with the full legal title.

4. The title of a mortgagee, though legal, is in fact special, in that till the right of redemption is extinguished his property interest is limited to the amount due upon the indebtedness.
5. While the general property of a chattel mortgagor in the chattels involved continues, he may sell or mortgage the same, conveying a good title thereto subject to the primary incumbrance.
6. While the title of a chattel mortgagee remains subject to the right of redemption, if the property involved be converted by the mortgagor or any one else having an equitable right to the same, subject to the mortgagee's special property therein, the measure of the former's recovery of damages is the amount due and unpaid upon the mortgage indebtedness.
7. A vendee of a chattel mortgagor upon being called upon to pay off the mortgage indebtedness, is entitled to have applied thereon all sums of money paid upon the same out of the proceeds of property covered by the mortgage, that has been converted into money, whether included in the sale to such vendee or not, and is entitled to be subrogated to the rights of the mortgagee in any other security he may have for the payment of the mortgage indebtedness, to save him from loss, there being no superior equities.
8. If the mortgagor of chattels without the consent of the mortgagee confuses the same with other property of the same character belonging to a third person, and the latter, by consent of such mortgagor, converts the common property into money knowing the facts, actually or constructively, such third person is liable to the mortgagee as for money had and received, but only to the extent of the sum due upon the mortgage indebtedness, he having a right to the benefit of all other mortgage security to save himself against loss, as before stated, there being no superior equity.
9. If in the event last mentioned the third person pays to the mortgagee a sum of money out of the proceeds of all or a part of the mortgaged property to apply upon the mortgage indebtedness, he is entitled to have the same applied thereon regardless of any agreement such mortgagee and the mortgagor may make to which he is not a party.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Marathon county: JAMES O'NEILL, Judge. *Reversed.*

The substance of the pleadings upon which the action was

tried, omitting formal allegations and those showing legal capacity to sue, was as follows:

Complaint: February 1, 1891, plaintiff was the owner and entitled to the legal possession of 1,700,000 feet, board measure, of pine lumber and a quantity of other products derived from the manufacture of pine saw logs located in the millyard of E. K. Buttrick, all being of the value of $15,500. On or about the last day of February, 1891, defendant converted all of such property to its own use and converted the same into money, receiving the full amount of said value, and retained the same. Thereupon plaintiff elected to hold defendant liable for said proceeds as and for money had and received by it for his use, and before the commencement of this action duly demanded payment of the same, which was refused.

Answer: March 31, 1890, defendant contracted with J. E. Kathan in effect as follows: The latter sold to the former the lumber, lath and shingles to be manufactured from 5,000,000 feet of logs of a specified mark for $7 per thousand feet piled in the millyard at the place of manufacture, and one half the excess thereof received upon a resale of the same, provided the circumstances would permit of the deal being closed out by January 1, 1891, otherwise the defendant agreed to pay Kathan interest on the value of the lumber at $7 per thousand feet until sold. The logs were manufactured into lumber and the products piled in the millyard as contemplated by such agreement, during the season of 1890, and defendant paid to Kathan $38,777.33. The latter superintended such operations, and after the sawing season was over he rendered to defendant a statement of the amount of products on hand, showing that there were 5,000,000 feet of the lumber, mill run, and a quantity of lath and shingles, besides some cull lumber, all piled in the millyard of E. K. Buttrick, at Rhinelander, Wisconsin. July 10, 1890, Kathan and wife mort-

gaged to Walter A. Scott the standing timber on certain lands and the saw logs that might be cut therefrom, it being stipulated in the mortgage that the timber should be cut from the lands, made into saw logs and the saw logs manufactured into lumber and the lumber piled at the place of manufacture and so marked as to identify the same as having been produced from said timber and as being covered by said mortgage. The mortgage was given to secure a loan of $10,000 and the interest thereon. It contained all the provisions usually inserted in chattel mortgages in respect to protecting the mortgagee's interest in the property after being converted into personalty, and the enforcing of the security in respect thereto. The instrument was duly executed so as to be entitled to record as a real-estate mortgage. The standing timber was cut, converted into lumber and other products, and the same were piled in the millyard as agreed upon as aforesaid. On the entire products made from all the logs involved in such transaction, there were 420,000 feet of lumber marked as mortgaged lumber. That and the manufactured products covered by the mortgage, made from the marked logs, up to the time of the sale of the lumber hereinafter mentioned, remained in the millyard under the control of Kathan by Scott's consent. He was authorized by Scott to sell the same at not less than $8.50 per thousand feet. January 22, 1891, under such authority, Kathan included all the mortgaged lumber with that involved in the deal between himself and defendant in a sale to the H. Whitbeck Company, the entire consideration to be paid to defendant. Scott was conversant with the transaction and acquiesced therein. January 22, 1891, there was a settlement between Scott and Kathan and the defendant, and the amount going to each out of the proceeds of the sale was ascertained, that to be paid to Kathan for Scott on account of the mortgaged lumber being adjusted at $6,428, which sum was paid, the money reaching the possession of defendant. At the close of the sawing season of

1890 there remained, covered by the mortgage, 300,000 to 400,000 feet of saw logs and 5,000,000 feet of timber, all being of a sufficient value to secure payment of the balance of the mortgage indebtedness. Scott in fact never had any interest in the lumber sold as aforesaid, except as to 420,000 feet piled by itself in the millyard and designated as mortgaged lumber.

The complaint and answer were both amended pleadings. The original complaint was served September 3, 1898, several years after the action was commenced. The original answer was served September 14, 1898. It was framed with reference to the allegations of the complaint, in effect admitting payment of $6,428 upon the mortgage indebtedness in February, 1891. The purpose of the amendment of the complaint was to withdraw such admission. The motion to do so was opposed and the ruling in favor of plaintiff excepted to. The facts brought to the attention of the court, upon which such ruling was based, in addition to those heretofore stated, are as follows: The admission in the complaint as to a payment having been made upon the mortgage indebtedness was embodied in the complaint wholly through ignorance of the attorney who drew it of the facts. He acquired a false impression in respect thereto which was not corrected till after the receipt of the amended answer. He was not informed by the plaintiff that any such payment had been made, but gained the impression to that effect from a statement of account made by defendant to plaintiff. In fact, no payment whatever upon any account was made in January, 1892. A payment of $6,428 was made February 1st, not on the indebtedness mentioned in the complaint, but on account of a written order given by Kathan upon the defendant to the plaintiff to apply on other indebtedness. Conclusive evidence of the facts as stated will be produced upon the trial. The action was commenced September 3, 1892. Service of the complaint was delayed by consent of the parties and in

view of a possible settlement till September 3, 1898. The case was not tried till some three years thereafter. During all that time defendant's counsel supposed from the pleadings that there was no controversy as to $6,428 having been paid upon the mortgage indebtedness. They prepared for trial of the cause with that view. In the meantime both Kathan and Scott were examined, during which there was no suggestion of any dispute as to payment having been made as stated. During Scott's examination he testified to having received $6,428 in answer to questions plainly indicating that they had reference to a payment upon the mortgage indebtedness. He said he received the same in February, 1891, and that he received it upon the Kathan order. Kathan died a few days before the trial. In the meantime there had been a change of venue. Immediately after the death of Kathan, May 6, 1901, plaintiff's attorneys notified defendant's attorneys of their desire to amend the complaint by withdrawing the admission that $6,428 was paid upon the mortgage indebtedness. When the case was finally brought on for trial, June 24, 1901, with all such facts before the court, plaintiff was allowed to amend the complaint as desired.

The cause was tried by the court. According to the decision filed the evidence was to the following effect: During the season of 1890, 4,722,960 feet of pine saw logs were manufactured at E. K. Buttrick's sawmill in Rhinelander, Wisconsin, the products thereof consisting of about 5,650,000 feet of merchantable lumber, mill run, including lath and shingles reduced to a lumber equivalent, being, under the direction of J. E. Kathan, by consent or agreement of all parties interested, piled in Mr. Buttrick's millyard, where the same remained until sold as hereinafter mentioned. The title to 3,324,880 feet of such logs, under the contract between defendant and Kathan mentioned in the pleadings, was in defendant. The title to the balance of the logs, 1,498,080 feet, was in Kathan, subject to the Scott mortgage

mentioned in the pleadings. The marks on the mortgaged logs were not recorded in the district where the same were cut and manufactured. The mortgage was filed in the office of the proper city clerk and duly recorded in the office of the proper register of deeds, and a copy thereof was filed in the office of the lumber inspector of said district, but the same was not recorded. Defendant had notice of the existence of such mortgage. It provided that the products of the Scott logs should be piled separately from the products of any other logs and should be so marked as to indicate that they were covered by such mortgage. The title to all the other lumber was in the defendant under its contract with Kathan. Defendant was bound by its contract to pay Kathan for said other logs a sum equal to $7 per thousand feet for the merchantable lumber made therefrom, ninety cents per thousand for the lath, and $1.25 per thousand for the shingles of certain specified grades, and the cost of manufacturing the culls, by the time agreed upon if the lumber was then sold, and if not then sold with interest thereon at the rate of eight per cent. per annum from such time till the same should be sold, and also to pay him one half of the excess received from the lumber over such amount. Kathan, without knowledge or consent of Scott but with the knowledge of defendant, neglected to follow the stipulations of the mortgage by having the products of the mortgaged logs piled separately from all others. Whereas there were 1,656,724 feet of such products, there were piled as stipulated in the mortgage but 420,000 feet. The rest of such products were intermixed and piled with those from defendant's logs. Scott did not know thereof till after the lumber was sold and he had received a portion of the proceeds as hereinafter mentioned in the belief that 420,000 feet of lumber represented all the products of the mortgaged logs. He consented to the sale thereof by Kathan and defendant with the other lumber, on condition that an amount equal to $8.50 per thousand feet

on 420,000 feet, of the proceeds of the sale, should be paid to him. Some time prior to the sale Kathan gave Scott an order on defendant for any sum that might be found payable by the latter to Kathan on the log and lumber deal between them, and such order was deposited with the defendant and was honored as hereinafter stated. All the lumber in the millyard was sold by the defendant and Kathan January 22, 1891, and the proceeds thereof, February 9th thereafter, came to the possession of defendant, such amount being $49,026.83. The element included therein representing the mortgaged logs was $14,082.14. Shortly after such sale there was a settlement between defendant and Kathan in which it was determined that, after applying so much of said proceeds as were necessary to balance the payments made to the latter upon the log and lumber deal and the one-half to which defendant was entitled, there was left going to Kathan $6,428. A draft for that amount was sent to Scott. He received the same and by agreement with Kathan, but without the knowledge or consent of defendant, applied the money, first in discharge of a claim of $5,049.98 he had against Kathan for money loaned him and used in his logging operations, and $1,330 upon the mortgage indebtedness. Scott still held under his mortgage timber and logs out of which he realized, March 2, 1892, $3,745 and August 2d thereafter $197.80. After applying such amounts upon the mortgage indebtedness there is left due Scott thereon $6,028.87 with interest on such sum from August 2, 1892, at the rate of eight per cent. per annum. Soon after the payment was made as aforesaid Scott complained to defendant that he had not received the amount out of the proceeds of the lumber to which he was entitled. There was never any settlement between Scott and Kathan or defendant in regard to the aforesaid claim, but defendant never acquired any interest whatever in the mortgaged logs or lumber. Defendant knew, when

it participated in the sale of the lumber and received and appropriated the proceeds thereof, of the rights of Scott.

Upon such facts and others not necessary to mention it was held as a matter of law that Scott was entitled to hold defendant liable for money had and received, in a sufficient sum to discharge the balance due upon his mortgage indebtedness, and judgment was rendered accordingly.

The defendant appealed from the judgment. Afterwards, in this court, upon suggestion of the death of the plaintiff, the cause was revived in the name of the *Illinois Trust & Savings Bank,* as administrator of his estate.

For the appellant there was a brief by *Hurley & Jones,* attorneys, and *H. H. Hayden,* of counsel, and a reply brief by *Hurley & Jones,* attorneys, and *M. B. Rosenberry,* of counsel; and the cause was argued orally by *M. B. Rosenberry* and *M. A. Hurley.*

For the respondent there were separate briefs by *Curtis & Reid* and *Greene, Fairchild, North & Parker,* and oral argument by *A. H. Reid* and *Geo. G. Greene.*

The following opinion was filed May 8, 1903:

MARSHALL, J. Error is assigned because the trial court permitted the complaint to be amended, withdrawing the admission that the $6,428 paid Scott by appellant was on account of the mortgage indebtedness. In our view that is immaterial. We will say, however, that whether the amendment was proper or not admits of serious doubt. The admission stood upon the record for years. The attitude of Mr. Scott and his attorney during that time did not furnish any ground for even a suspicion that it would be claimed upon the trial that the payment was not made on account of the mortgage indebtedness or that it was not in fact so applied. In the meantime he and Kathan were examined under oath, the latter twice. Of course they would have been interrogated

particularly on the subject of such payment if it had been thought by respondent's counsel that there was or would be any dispute about that matter. Such examinations not only did not suggest the existence or probability of such dispute, but were well calculated to support the view that the truth of the matter was as suggested in the complaint. At the last moment, and upon the happening of the occurrence which rendered it impossible for appellant to know from the mouth of Kathan what occurred between him and Scott at the time the latter applied the $6,428 upon the unsecured debt, the latter was permitted to entirely change his attitude,—to make such change in face of the obvious situation that, since, when he received the money, he had yet a large amount of security for the $10,000 loan independently of any claim upon appellant, it was perfectly natural and competent for an arrangement to be made between him and Kathan to apply the payment upon the unsecured indebtedness, though made by appellant on account of the mortgage indebtedness, and to at the same time recognize the latter's right to have the same, as to it, regarded as at least a *pro tanto* discharge of the lien upon the fund produced by the sale of the mortgaged property, and that the death of Kathan rendered it impossible for appellant to meet the new situation presented by the amendment, was, to say the least, a great stretch of judicial discretion, notwithstanding the broad field within which such discretion is permitted to operate as held in the decisions of this court. *Post v. Campbell,* 110 Wis. 378, 85 N. W. 1032; *Gates v. Paul,* 117 Wis. 170, 94 N. W. 55.

There appears to be some difference of opinion between the learned counsel who presented here respondent's side of the case. On the one hand counsel take the position that appellant never acquired any interest whatever in the mortgaged lumber or logs or the proceeds thereof. The learned court adopted that view and held that the payment of the $6,428 left appellant still liable, since, as claimed by respondent, the

mortgaged lumber produced over $14,000, regardless of whether such payment was out of such proceeds or not; while other counsel freely admit that if such payment was in fact made out of such proceeds, so far as appellant was concerned, it could not have been properly applied without its consent to any unsecured indebtedness of Kathan to Scott. We will consider the case from both such aspects.

It seems that the finding that appellant never obtained any interest whatever in the mortgaged property or the fund received therefrom is manifestly wrong. It is elementary that a mortgagee of chattel property holds the legal title thereto, but nevertheless, till default and actual possession of the property in himself, his interest, as against the mortgagor or any person claiming under him, is special. It is limited to the amount of the mortgage indebtedness. The general property and the equitable title being in the mortgagor or those claiming under him, the mortgagor may sell the mortgaged property and convey a good title thereto subject to the mortgage. Such title is equitable in character, to be sure, but it is of sufficient dignity to be regarded as a general property right, good as against the whole world except as to the special interest of the mortgagee, which, till it becomes absolute, may be extinguished by the owner of the general property by payment of the mortgage indebtedness. In case of a conversion of the property as to the mortgagee, the measure of damages recoverable by him is limited to the value of his special interest therein, the amount due upon the mortgage. *Smith v. Konst,* 50 Wis. 360, 7 N. W. 293. The mortgagor may not only sell the property and convey a good title subject to the mortgage, but he may place a second mortgage thereon, and the subsequent vendee or mortgagee may protect his interest and clothe himself with a full legal title by paying off the first incumbrance. *Smith v. Coolbaugh,* 21 Wis. 427. It follows necessarily that the conduct of Kathan in mixing the mortgaged lumber with appellant's lumber and

treating all of it substantially as products coming under his contract with appellant, and the treatment by appellant, with knowledge of the facts, of the lumber so confused, substantially as legitimately under such contract, vested in it an interest therein and in the proceeds thereof good as against the whole world except Scott under his mortgage. It was competent for it at any time to extinguish the mortgage by paying the amount due thereon. If Scott had brought suit against appellant before receiving the $6,428, the limit of his recovery on account of the fund derived from the mortgaged lumber would have been, necessarily, the amount received from such lumber upon the sale to Whitbeck & Co., not exceeding the amount due upon the mortgage indebtedness. It follows that if the $6,428 was paid to Scott on account of such fund and by reason of Scott's interest therein, his remaining interest was that much less than before.

Whether the $6,428 was in fact paid out of the proceeds of the mortgaged lumber we are not informed by any specific finding made by the trial court. The idea apparently embodied in the findings is that the payment was made out of profits due Kathan growing out of the execution of the contract between him and appellant of March 31, 1890, and that as such contract did not cover the mortgaged logs appellant cannot legitimately refer to such logs or the products manufactured therefrom as the origin of the fund out of which the payment was made. We are unable to find in the evidence legitimate support for that view. The findings pretty clearly show, and the evidence leaves no reasonable doubt on the question, that Kathan, who had, as we have seen, the general property right to the mortgaged logs and lumber, treated such lumber, with appellant's consent, as he treated all other logs owned by him which came into the Buttrick mill boom during the sawing season of 1890. No discrimination was made between the lumber from the different kinds of logs, except as to about 420,000 feet of lumber, which was piled by itself

and marked as Scott lumber in conformity with the requirements of the mortgage. All the logs were manufactured together. The lumber was all piled and treated as appellant's. The entire stock was so treated in the sale to Whitbeck & Co. The proceeds of the sale came to the hands of appellant as contemplated in the contract of March 31, 1890, and were accounted for to Kathan according to the evident understanding between the parties. Nevertheless, as we have seen, the learned trial court found that appellant never obtained any interest whatever in the mortgaged logs or lumber, and therefore never obtained any title or interest in the fund produced therefrom. Upon that theory the case passed to judgment,—upon the theory that the entire proceeds of the mortgaged property, $14,082.15, was received by appellant to the use of Scott, regardless of what was in fact due upon the mortgage indebtedness; that his interest in the mortgaged property and the fund derived therefrom was absolute, whereas it was only special and limited, as we have seen.

As stated before, substantially all the logs, in manufacturing the same into lumber and preparing the products for sale, and the equivalent thereof in money after the sale, were treated as covered by the contract between appellant and Kathan. The lumber, in the main, was piled in the Buttrick millyard so as to confuse beyond identification that produced from the mortgaged logs with that produced from the unmortgaged logs, and specifically described in the contract of March 31, 1890. All payments made to Kathan, including the $6,428, were charged to him on appellant's books. When the settlement was made between the parties the proceeds of the entire stock of lumber were treated as a single fund under the contract of March 31, 1890. It was all credited to Kathan and the profit going to appellant was charged to him. While there is some little confusion in the evidence of the witness who made up the account between the parties for closing, as regards whether the terms of the contract were liter-

ally followed or not, he testified very clearly that it was his understanding that the lumber was to be all credited to Kathan at the price agreed upon in such contract, and the result shows clearly, in our judgment, that it was so credited. The statement of the settlement under the contract, which was introduced in evidence, and the result transferred to appellant's books, do not show with exactness that the profits of the lumber deal were worked out by taking account of all of the lumber as if it were included in the contract referred to; but from all the figures it seems that no rational conclusion can be arrived at other than that the property and the fund derived therefrom were so treated. It is not to be wondered at that after the lapse of some eight years the witness was unable to explain in all respects just how the result carried to appellant's books was arrived at. He said that another statement, in his judgment, was made than the one exhibited in evidence containing the final work. It seems quite plain that reductions of the profits first worked out were made for some reason, consistent with the theory that the entire fund was treated under the contract of March 31, 1890. We are unable to perceive in the evidence, even by conjecture, that it was not so treated.

The feature of the case last discussed shows the prejudicial character of allowing the complaint to be amended after the lapse of many years after the death of the only party to the transaction with Scott in respect to whether the payment of $6,428 was received as a payment out of the fund derived from the mortgaged property, entirely changing the situation, as both Scott and appellant understood the same to be at the time the action was commenced.

The following satisfactorily indicates that the mortgaged lumber was treated as we have suggested and that the payment to Scott came therefrom. The price of all the lumber to appellant as per contract, including lumber from the mortgaged logs, was $38,777.23. The net amount received there-

from by appellant was $49,026.83, indicating a profit of $10,249.60, or $5,124.80 to each party. The statement in the record of the settlement between appellant and Kathan is to that effect. The account upon the books as closed, evidently to the satisfaction of Kathan, does not contain any charge identical with such a division of profits. The ledger accounts show that the entire proceeds of the lumber were credited to Kathan. That necessarily, in effect, placed the entire profit of the lumber deal to his credit, consistent with the theory that the matter was by mutual understanding worked out under the contract of March 31, 1890. The proceeds of the lumber having been credited to Kathan, placing to his credit the entire profits, treating the contract mentioned as conveying all the lumber to appellant in order to transfer its portion of the profit to the credit of its profit and loss account, it became necessary, one would say, to charge Kathan with the amount of such profits and to give a proper credit. Kathan's ledger account on appellant's books shows that such a charge was made, and presumably such a credit was given. The item, however, is $4,595.60, or $529.20 short of one half the profits as per the statement before referred to. The figures may well have been arrived at by some treatment of interest items, or insurance items, or other matters in the statement which the bookkeeper testified he thought was made other than that put in evidence. We are unable to even conjecture any way in which the mortgaged lumber could have been treated in the new statement so as to reach such result.

Thus we have seen, it appears, that the $6,428 paid Scott was not profits of the lumber deal between Kathan and appellant, for there was no such amount of profits. It represented his profits, undoubtedly, aside from overpayments theretofore made anticipating profits, and also all there was understood between the parties to be coming to him out of the proceeds of the entire stock of lumber sold out of the mill-yard. The amount is so charged to Kathan on the books. In-

stead of the memorandum explaining such charge indicating that it was paid specifically as profits, it indicates that it was paid just as we have suggested. Here is the memorandum:

"To check No. 7,179 for draft to W. A. Scott per J. E. K. order, being K.'s profits and sale of his own lumber to H. Whitbeck & Co. $6,428."

There can be no mistaking the meaning of that language. It voices this: The payment was made as a closing up of all claims of Kathan, both as to profits on the lumber deal between him and appellant and as to any lumber in the Whitbeck & Co. deal not strictly within the terms of the contract of March 31, 1890. It was made out of the general fund derived from all the lumber, and to close out Kathan's entire interest in the fund. That is in harmony with his evidence and all the evidence in the case. He said that the lumber from the Scott logs was not treated separately from the logs specifically mentioned in the contract of March 31, 1890; and that he was authorized by Scott to let it go in with the rest. The latter admitted that in his evidence, but said he consented to the sale relying on information from Kathan which was false; that only 420,000 feet were in the millyard. But let that be as it may, there is no escaping the conclusion that the $6,428 was paid as a closing with other payments, for moneys in appellant's hands, whether representing profits on lumber or proceeds of the lumber belonging to Kathan, sold to Whitbeck & Co. The payment, in the state of the account as it existed when it was made, after crediting the proceeds of the lumber, brought such account substantially to a balance. Two debit items of small amounts, with the charge for appellant's profits, balanced the account. Since Kathan's one-half of the actual profits of the lumber deal was but $4,596.60, and the proceeds of the mortgaged lumber, according to the findings of the court, were $14,082.15, it must be that Kathan received all his profits on the logs specifically covered by the contract of March 31, 1890, in advance. Here

is the account as it was closed, putting all the debit items up to the date of the charge on account of the check in question into one sum:

Aggregate debit items, as indicated.....	$38,183	97		
Feb. 9. To check No. 7,179 for draft to W. A. Scott per J. E. K. order, being K's profits and sale of his own lumber to H. Whitbeck Co.....	6,428			
Feb. 17. To check to Milroy..... ...	150			
Sept. 17. To cash.....	20			
1892. Dec. 31. To profit and loss.....	4,595	60		
By proceeds of lumber.....			$49,042	27
By insurance returned.....			335	30
	$49,377	57	$49,377	57
Withdrawing from the debit side of the account the check of.....	6,428			
And from the credit side the proceeds of the mortgaged lumber.....			14,082	15
We have this result.....	$42,945	57	$35,295	42

We have a debit balance against Kathan of $7,654.15. Can there be any mistaking that the comprehensive memorandum of the charge respecting the $6,428 was made to indicate that it covered the balance going to Kathan, whether of profits or for any lumber of his own included in the credit of the proceeds received from the Whitbeck Company; that with the mortgaged lumber out of the deal, Kathan received all his profits under the contract of March 31, 1890, in advance; that he had, before the sale to Whitbeck & Co., received all the proceeds of the logs specifically mentioned in such contract at the rates therein mentioned for the manufactured products, and the profits finally obtained out of the deal as well. If not, then the payment of $6,428 cannot be legiti-

mately referred to any other source than the fund produced from the mortgaged logs,—not referred to anything else either in fact or from any indication upon appellant's books.

But it is said that when the check was sent to Scott it was accompanied by a letter from appellant to the effect that it represented the amount due Kathan under the conditions of a certain contract, the same being directed to be turned over to Scott, and that he had a right, in view of such letter, to regard the payment as not coming out of the mortgaged logs, as they were not in the contract of March 31, 1890. This effectually answers that: The account was worked out between Kathan and appellant in the process of accounting between them by putting all of the proceeds of the lumber into a common fund. The letter was not intended to indicate that the money was paid out of the fund derived from the logs, other than the mortgaged logs. Scott, in view of all the facts, had no reason to otherwise understand it, because, so far as appears, he had no knowledge but that all the Kathan logs were covered by the contract of March 31, 1890. Again, he knew that all the lumber in the yard was to be sold for account of appellant, as between it and Kathan, that some 420,000 feet of the lumber at least came from his mortgaged logs, and with such knowledge he consented to have his interest therein sold with the rest and to rely upon an order from Kathan authorizing payment to him of whatever might be found due the latter from appellant, and that the draft was sent to him accordingly. Thus his conduct leaves no doubt that he knew some of the lumber in the Buttrick yard was produced from the mortgaged logs, that he expected the same to be handled, as between Kathan and appellant, as part of the general stock, that he expected his interests would be protected as the person primarily interested in the mortgaged lumber by a payment upon the Kathan order, and that the payment was made accordingly. True, he testified that he consented to the lumber being handled that way, relying upon representations made by Kathan that there were only about 420,000

feet in which he was interested, expecting that the proceeds thereof would be paid to him. But he knew such proceeds were to go through the hands of appellant under its arrangement with Kathan, whatever such arrangement was, and were to come out on the order. He testified on the trial to this effect:

"I knew before the sale that there was lumber in the Buttrick yard that came from the mortgaged logs. I knew of the sale and was satisfied with it. I knew that the purchase money was to be paid to the *Alexander Stewart Lumber Company*. I found no fault with that. I got an order from Kathan on the company. *I got it before the lumber was sold. I got it to protect my right and delivered it to the company. When I got the order I did not know that Kathan would sell the lumber. The Stewart Lumber Company sold the lumber.*"

That means this, if anything: Scott knew that some of the mortgaged lumber was piled in the Buttrick yard; that the sale thereof was to be controlled by appellant; that it was to be sold as part of its stock of lumber in the Buttrick yard; that he was willing to have the lumber so sold in view of the fact that the proceeds would come to the possession, for him, of a responsible party, the *Alexander Stewart Lumber Company*, and that he had an order on file with such company to protect his rights. So when he got the draft, obviously he understood it was sent pursuant to the order; *that it was given in protection of his rights. He had no property rights to be protected except by virtue of his mortgage.*

Scott's conduct after he got the check is consistent with the view above expressed. Soon thereafter he made complaint to appellant that the amount he had received was not in full for his proportion of the proceeds of the sale of the lumber; that the amount of the mortgaged lumber included in the sale was greater than had been represented to him. He testified on this as follows:

"I objected to the division of the proceeds of the sale on the ground that it was represented to me that there were over 400,000 feet of logs sawed that were under the mortgage.

I had not been allowed that, and I asked the reason. He [meaning an officer of appellant] claimed that the statement was all right and that I had all I could claim under the sale."

What statement was all right? Manifestly the statement showing that the proceeds of all the lumber went into a common fund, introduced in evidence. There can be no mistaking the meaning of that testimony. Scott understood that the $6,428 came out of the common fund, the proceeds of the mortgaged and unmortgaged lumber. He believed that more should be paid him because such sum was disproportionate to the amount of mortgaged logs that had been manufactured. Later, when this action was commenced, consistent with that theory, the admission was made in the complaint that the payment under discussion was on account of the mortgaged property, and that admission remained without an intimation, as before stated, that it was not in accordance with the facts, until Mr. Kathan died. Without stopping to discuss this phase of the case further, it is evident that when this action was commenced, and for some eight years thereafter, it was Scott's idea and that of his attorney, as well as the understanding of all parties concerned, that the $6,428 payment was made, so far at least as appellant was concerned, out of the proceeds of the mortgaged lumber and to apply on the mortgage indebtedness, and that they were possessed of a written statement from appellant's office in harmony with that view.

The conclusion is that the $6,428 was paid out of the proceeds of the mortgaged lumber if the amount thereof was as found by the trial court, and in respect to that we see no good reason for disturbing the court's findings. It was intended to be applied on account of the claim which Scott had on the lumber sold to Whitbeck & Co., and it was so received by Scott. Now it is quite immaterial to this case what application was made of the money as between Scott and Kathan. The principle is elementary that the proceeds of mortgaged

property must be applied to extinguish the mortgage indebtedness regardless of any agreement between mortgagor and mortgagee, so far as the rights of innocent third persons would otherwise be prejudicially affected. Jones, Chattel Mortgages, § 640. Scott's interest in the fund received by appellant from Whitbeck & Co. cannot exceed the amount of such proceeds or the amount due upon the mortgage indebtedness left after deducting therefrom all sums upon the mortgage security, being the $6,428 received from appellant February 10, 1891, $3,748.09 received from logs and lumber March 23, 1892, and $197.80 received August 2, 1892.

The point is made on exceptions that Scott gave his agent, Kathan, authority to sell the mortgaged lumber, and therefore that he cannot pursue appellant, who acted in good faith in joining with Kathan and selling the lumber and in disposing of the proceeds. The trouble with that position is that the court found that Scott consented only to a sale of the lumber which he was informed was piled separately in the mill-yard amounting to 420,000 feet; that appellant consented to Kathan's wrongdoing in confusing about 1,200,000 feet of mortgaged lumber with lumber not affected by the mortgage; that it profited thereby, by joining, with knowledge of the facts, in selling the stock as unaffected by the mortgage, except as to 420,000 feet, and receiving and appropriating the proceeds thereof to his own use. There is evidence in the record to support that view,—evidence so strong that under the rules applicable to the subject we cannot properly overrule the circuit judge's conclusions. There is evidence tending to show that, whereas 1,656,724 feet of lumber was manufactured from the mortgaged logs, appellant knew that all but 420,000 feet thereof was confused with its lumber, while Kathan was, by his conduct at least, giving out to Scott that the lumber manufactured from the mortgaged logs was but the small amount of 420,000 feet piled separate and marked as such. Assuming, as we must, that the facts which such

evidence tends to prove exist as found by the trial court, it cannot be properly said that Scott consented to the sale of any mortgaged lumber except the 420,000 feet, or that appellant was an innocent party in joining in a sale of some 1,200,000 feet of other mortgaged lumber and receiving the proceeds thereof and treating the same regardless of the mortgagee's rights. Since appellant was a guilty participant with Kathan as above indicated, it became liable to Scott for money had and received to the extent necessary to satisfy plaintiff's claim, subject to the rule heretofore stated, that such claim can be considered only as being the amount of the mortgage indebtedness according to the terms of the $10,000 note evidencing the same, after applying thereon all the sums received out of the mortgaged property as before indicated.

There are many other questions discussed in the briefs of counsel, but it is believed that such of them as are material to the disposition of this case are included in the points that have been discussed and decided.

The result is that the judgment appealed from must be reversed and the cause remanded to the trial court with directions to render judgment in favor of plaintiff in accordance with this opinion. The $6,428, the $3,748.09 and the $197.80 must be applied on the mortgage indebtedness as received, and judgment be rendered for the balance with costs as heretofore taxed and allowed.

By the Court.—So ordered.

A motion for a rehearing was denied September 29, 1903.

BALCH, Respondent, vs. BEACH and another, Appellants.

April 18—September 29, 1903.

Constitutional law: Municipal indebtedness: Limitation: Offsetting taxes: Warrants: Ratification of indebtedness: Equity: Jurisdiction: Relief against fraudulent judgment: Collusion of officers: Taxpayers' action: Fraud, actual and constructive.

1. The rule that municipal revenues in process of collection should be counted against indebtedness in determining whether the constitutional limit in that regard has been exceeded, does not authorize offsetting taxes voted or levied till the same shall have been duly spread upon the tax roll and that placed in the hands of the proper municipal officer with authority to collect the tax.
2. A provision of law authorizing the issuance of municipal warrants upon the corporate treasury, where a fund for payment of indebtedness has been voted, treats only of power to issue evidence of established liabilities, not of that to incur indebtedness. Such warrants are merely evidence, *prima facie*, of the existence of indebtedness established and ready for payment, and are counted as such in solving whether the constitutional limitation in that regard has been reached.
3. Municipal indebtedness in excess of the constitutional limitation cannot be made good by ratification, since power to authorize originally is a condition precedent to the power to ratify subsequently.
4. Municipal indebtedness void at law because in excess of the constitutional limitation is void in equity, all persons dealing with the municipal corporation being presumed to know the limits of its power.
5. If one deals with a municipal corporation in respect to a matter beyond its corporate power and prohibited, he can have no relief, either at law or in equity, to save himself from loss; though in the absence of the element of prohibition he may obtain relief if not guilty of more than constructive wrong, so far as his money or property shall have been used by the municipality for its legitimate corporate purposes.
6. A court of equity has jurisdiction to grant relief from a judgment obtained by fraud perpetrated by the judgment creditor, the judgment debtor not being guilty of any inexcusable ignorance or negligence.

7. Equity jurisdiction is not competent to afford relief in the situation last mentioned by granting a new trial or disturbing the judgment, but is by acting upon the judgment creditor, preventing him from enforcing his judgment.
8. If public officers, by fraudulent collusion, neglect to perform their duties in respect to preventing the incorporation of invalid claims against their municipality in a judgment, taxpayers thereof, acting seasonably, may intervene by a suit in equity in the name of one or more of them acting for all, and successfully invoke its jurisdiction to restrain the collection of the judgment.
9. In the situation last stated the suing taxpayers act in a twofold capacity: as vindicators of their own right, and of that of the corporation. The existence of the latter being essential to that of the former, the suit is in form to enforce the right of the corporation. Whether the right and remedy of the corporation be legal or equitable, the right of the taxpayer is legal and his remedy equitable.
10. Equity suffers no wrong to exist without a remedy, the injury being sufficient to be appreciated by the conscience of the chancellor, and its jurisdiction being invoked seasonably and with clean hands.
11. The power of equity to protect the taxpaying public from loss by the misuse of public funds in the payment of invalid claims is not exhausted upon such claims being robed in a judgment, that being obtained by fraudulent collusion, actual or constructive.
12. The circumstance that municipal officers, having knowledge or reasonable means of knowledge, acting with ordinary attention to their duties, that claims sought to be put into judgment against the corporation are void, and knowing that the voters thereof have taken action adversely to the payment of the same, believing that they were void, permitted the person interested in enforcing such claims to obtain a judgment thereon by default, such officers being the persons upon whom the summons was required to be served in order to properly commence the suit, and omitted to bring the existence of the suit before the governing board of the corporation, there being members thereof, to their knowledge, in favor of contesting the claims, such officers making no good faith attempt to have the suit defended but allowing the judgment to be speedily entered after the action of the people condemning the claims involved and before the lapse of sufficient time under the circumstances for them to obtain knowledge of the pendency of

the suit, shows clearly such fraudulent collusion to circumvent the will of the taxpayers as to justify the exercise of equity jurisdiction to restrain the collection of the judgment. [Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

Taxpayer's action to enjoin the collection of a judgment against Joint School District No. 1 of the towns of Melrose and Irving. The facts were these: The assessed valuation of the taxable property of the district for 1899 was $71,564, and for 1900, $76,748. The number of inhabitants for said years was 376. July 3, 1899, in form, at the annual school meeting of the district, it was voted to obtain plans for a school building to cost not to exceed $4,000, and a building committee was appointed to carry out that idea. August 9, 1899, in form, the people of the district determined to borrow $2,500, and such determination was carried out, the money being covered into the treasury. Thereupon the building committee obtained plans and proceeded to incur indebtedness in the name of the district for the suggested school building, no specific action, however, of the people of the district to build such building or to incur indebtedness in that regard having been taken. June 30, 1900, the indebtedness of the district was $5,076.55. There was then in the treasury, in the building fund, $425.11, and in the general fund $245.50. Subsequently, during such year, $199.50 and no more was paid into the treasury. After such date, and prior to October 1, 1900, the indebtedness on which the judgment, the collection of which is here sought to be enjoined, was based, except $41.25, was incurred in and about the construction of the schoolhouse, defendant, the judgment creditor, being a member of the building committee, of which he continued to be a member until the judgment was rendered. The school building was completed prior to December 22, 1900,

the district receiving full value for all the money expended in respect thereto. The building was occupied for the purposes for which it was constructed on and after October 4, 1900. At the annual town meeting of the district for 1900, the district board was in form directed to borrow in the name of the district $1,000, but the authority so conferred was not exercised. At the same meeting a tax of $1,600 was in form voted for building purposes. Neither of the town boards at any time certified to the necessity for such tax, nor did the district clerk certify the vote to either of the town clerks. December 22, 1900, the district clerk certified to the two town clerks that a $1,000 tax had been raised by the district on July 2, 1900, by its vote to raise $1,600 for building purposes. In a taxpayer's action commenced in January, 1901, the collection of any tax based on such certificate was temporarily enjoined and the injunction remains in force. The action in which the judgment in question in this case was rendered was commenced by service of the summons and complaint, in due form, on the district clerk and district director. No defense was made to such action, nor did the treasurer of the district know of its commencement until after judgment, though there was no collusion between the plaintiff in such action and the district officers in respect to the matter involved. It was stipulated upon this trial that at least $58.30 on account of the judgment constituted valid indebtedness of the district. Defendant *Mark Beach,* was, as indicated, a party on behalf of the district, acting as a member of its building committee in incurring the indebtedness put into the judgment. He became the owner of the claims against the district on account of such indebtedness by assignment, and then put the same into judgment while he was yet a member of the building committee, as before indicated.

Upon such facts the trial court decided that judgment should be rendered permanently restraining the collection of

the judgment except as to $58.30, and judgment was so rendered.

For the appellants there were briefs by *Pope & Pope,* and oral argument by *Carl C. Pope.*

For the respondent there were briefs by *Higbee & Bunge,* and oral argument by *G. W. Bunge.*

The following opinion was filed May 29, 1903:

MARSHALL, J. The theory upon which the decision of the lower court was rendered is that the indebtedness, so called, forming the basis for the judgment, the collection of which is sought to be enjoined, had no existence in fact, being in excess of the constitutional authority of the district to incur; that its officers committed a breach of duty in not defending the action to effect on that ground; that under the circumstances the judgment is fraudulent in law; that in equity, at the suit of a party competent to move in the matter and seasonably moving, the collection of such judgment may be restrained; and that the void claims were not converted into valid claims by merely being put into judgment, even though such judgment was not permitted to be entered by any intentional neglect on the part of the district officers. The theory of appellants is that the indebtedness was not in excess of the constitutional limitation, first, because the tax voted at the district meeting, held July 2, 1900, should be counted as available assets under the rule on that subject; second, because the indebtedness was incurred in anticipation of the collection of a tax specifically voted to meet the same; third, because, if the indebtedness was void at the outset it was subsequently ratified by the district; fourth, because the judgment was not inequitable; fifth, because, there being no collusion between the judgment creditor and the officers of the district in putting the indebtedness into judgment, it is not competent for a court of equity to prevent its collection. We

will give such attention to each of such propositions as they seem to warrant.

1. The theory invoked by counsel in support of the first proposition, as regards what constitutes assets to be counted against liabilities of a municipality in determining whether, in respect to the latter, the constitutional limitation to incur the same has been exceeded, was formulated by this court in *Earles v. Wells,* 94 Wis. 285, 68 N. W. 964, in these words: "Money and assets in the treasury, and current revenues collected or *in process of immediate collection.*" That has since been several times approved. *State ex rel. M., T. & W. R. Co. v. Tomahawk,* 96 Wis. 73, 93, 71 N. W. 86; *Crogster v. Bayfield Co.* 99 Wis. 1, 74 N. W. 635, 77 N. W. 167; *Rice v. Milwaukee,* 100 Wis. 516, 521, 76 N. W. 341. In the last case cited it was held that the rule under discussion must be restrained to its specific meaning. Taxes in immediate process of collection do not include taxes merely voted. Taxes are not in immediate process of collection till the tax roll shall have been placed in the hands of the proper collecting officer with authority to receive, and with the right of the taxpayer to pay, the tax.

2. Counsel rests the second proposition on *Kane v. School District,* 52 Wis. 502, 505, 9 N. W. 459, 460, and *Scott v. School Directors,* 103 Wis. 280, 283, 79 N. W. 239, referring particularly to the following language of Mr. Justice TAYLOR in the first case mentioned:

"These provisions of the statute very clearly limit the power of the director and clerk of a school district to issue orders upon the treasurer of the district, to cases where the money is due and immediately payable to the person in whose favor the order is issued, and where the funds for the payment of such debt have been apportioned to such district, or have been voted by the district for the payment thereof."

That refers to the authority of school district officers, under the statute, to issue orders as a necessary step in the payment of valid debts already incurred, not to the authority of school

districts to incur indebtedness. Mr. Justice TAYLOR was very careful to explain that the statute deals with the authority to give out the mere instruments required by law to permit a disbursing officer of a municipality to pay its indebtedness; that it has nothing whatever to do with the power to contract debts; that a municipal debt is one thing, and an order for its payment, the mere evidence that the debt has been audited and is ready for payment, is quite another thing. The second case cited is along the same line. Manifestly, the subject discussed therein does not reach anything involved in this case. Outstanding orders of a municipal corporation upon its treasury are always taken account of in determining the amount of its indebtedness, but solely upon the theory that, *prima facie,* they evidence established indebtedness. Mere proof in any case that they were prematurely issued, the indebtedness in fact existing, will not militate against such indebtedness being considered on the question of whether the constitutional limitation in that regard has been exceeded, for the obvious reason that it is the substance that counts, not the mere evidence thereof. The making and setting afloat of the latter does not create a debt. It is of no significance whatever unless preceded by the debt itself, and it may not be where there is such indebtedness, as regards authority to draw money from the public treasury, if prematurely issued or issued without conformity to law, as held in *Kane v. School District, supra.*

3. On the subject of ratification, counsel invoke the familiar principle upon which the decision in *McGillivray v. Joint School District,* 112 Wis. 354, 88 N. W. 310, was grounded, that the ostensible act of a school district within the scope of its powers, the officers, however, proceeding in fact without being duly authorized, may subsequently be given original validity by ratification. That was applied in the *McGillivray Case* in this way: It was held that at the time the indebtedness in question was incurred in form the school district did

not have power to incur the same at all, except as to $594.44, and that, though it did not so execute its power in respect to such sum that a binding obligation of the district to pay it was incurred, for want of a proper authorization of its officers to make the contract in regard thereto, their action was subsequently ratified and given original validity by the power that might have originally conferred upon them authority in the matter, and so the district became bound. As we understand that case, it is decisively against the counsel's position that the indebtedness in question was made valid by ratification, for this reason: The district did not have authority to incur the indebtedness at all at the outset. Counsel say the district had authority to build a schoolhouse, and therefore, within the spirit of the rule of the *McGilliwray Case,* it had authority to validate obligations incurred in form but not in fact for school purposes. The power to build a schoolhouse is by itself too remote to bring the indebtedness in question within the rule under discussion. The constitutional limitation is not upon the power to build schoolhouses or do any particular thing requiring the expenditure of money or liable to cause the creation of municipal indebtedness; it is upon the power to incur the indebtedness.

4. The proposition that the judgment is not inequitable in view of the fact that it is based on indebtedness in form, absolutely void in fact because the district was prohibited from incurring the same, has, it seems, no support in sound reasoning or authority. The bar of the constitution against excessive municipal indebtedness would be very weak indeed to protect the taxpaying public if, when plainly overstepped, the resulting obligation could be enforced upon equitable grounds; or if a taxpayer, upon invoking the jurisdiction of equity to prevent its enforcement, were to himself meet the arm of equity raised in defense of an invasion of constitutional rights. No one can occupy a position of defiance to the fundamental law and defend himself successfully there-

under by invoking the jurisdiction of equity. That principle was clearly declared in *Thomson v. Elton,* 109 Wis. 589, 85 N. W. 425, and *McGillivray v. School District, supra,* in the holding that if a municipality obtains money of a person upon a contract which it not only has no power to make but is prohibited from making, such person has no equitable right to recover the same even though he may be able to show that it was in fact used for legitimate municipal purposes. Courts, in such a situation, both of law and equity, upon grounds of public policy, leave both parties where they have placed themselves.

5. The proposition that the facts do not warrant the exercise of equity power to prevent appellant from enjoying the benefit of his judgment, under the established rules of this court on the subject, is the most serious one to deal with. Its proper solution must be in the main, if not wholly, determined in the light of these principles:

(1) A court of equity has jurisdiction to relieve against a judgment upon the ground that it is contrary to equity where there is no other remedy, upon several different grounds, and among them fraud upon the party seeking the relief by the person who obtained the judgment, such party not being guilty of any inexcusable ignorance or negligence in the matter. *Stowell v. Eldred,* 26 Wis. 504; *Barber v. Rukeyser,* 39 Wis. 590; *Hiles v. Mosher,* 44 Wis. 601; *Johnson v. Coleman,* 23 Wis. 452; *Nevil v. Clifford,* 55 Wis. 161, 12 N. W. 419; *Crowns v. Forest L. Co.* 102 Wis. 97, 78 N. W. 433.

(2) The jurisdiction of equity is not exercised to disturb a judgment. That can only be done according to methods provided by the Code. But it acts directly upon the party who is in a position to and might, if not restrained of his liberty, enforce the judgment, tying his hands so as to prevent him from doing so, thus leaving the judgment good in form but valueless and harmless in fact. *Crowns v. Forest L. Co.,*

supra; Zinc C. Co. v. First Nat. Bank, 103 Wis. 135, 137, 79 N. W. 229; *Johnson v. Huber,* 106 Wis. 282, 82 N. W. 137; *Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571.

(3) If public officers neglect to perform their official duties in respect to preventing the municipality from being burdened with the payment of illegal claims or suffering loss on account of money illegally paid out of the public funds, the taxpayers, in the name of one or more of such, suing in behalf of all, may intervene and remedy the mischief through the power of a court of equity. *Quaw v. Paff,* 98 Wis. 586, 74 N. W. 369; *Frederick v. Douglas Co.* 96 Wis. 411, 71 N. W. 798; *Land, L. & L. Co. v. McIntyre,* 100 Wis. 245, 75 N. W. 964; *S. C.* 100 Wis. 258, 75 N. W. 964; *Rice v. Milwaukee,* 100 Wis. 516, 76 N. W. 341; *Webster v. Douglas Co.* 102 Wis. 181, 77 N. W. 885, 78 N. W. 451; *Mulberger v. Beurhaus,* 102 Wis. 6, 78 N. W. 402; *Endion Imp. Co. v. Evening T. Co.* 104 Wis. 432, 80 N. W. 732; *Egaard v. Dahlke,* 109 Wis. 366, 85 N. W. 369; *St. Croix Co. v. Webster,* 111 Wis. 270, 87 N. W. 302; *Northern T. Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460; *Kircher v. Pederson,* 117 Wis. 68, 93 N. W. 813.

(4) In such a case the person or persons invoking equity act in a twofold capacity: as vindicators of their own right, and also the right of the corporation. The existence of the latter right being essential to the existence of the former, the suit is in form one to enforce the right of the corporation. Those whose duty it is to guard its interests failing to do so, the members thereof are deemed to have a legal right, and to be entitled to an equitable remedy to protect it, to use the only jurisdiction that can afford them protection from the resulting injury, because the law courts cannot, operating of course by the old forms, afford a remedy. *Kircher v. Pederson, supra; Land, L. & L. Co. v. McIntyre, supra.*

(5) Above all and over all is the supreme principle to which the vigilant, clean-handed, but wronged party may re-

sort when all legal remedies fail, and even precedents for an equitable remedy also, fitting the situation with exactness as to facts,—that equity suffers no wrong to go without a remedy, the wrong being of sufficient gravity to be appreciated by the conscience of the chancellor, and application being made to its jurisdiction seasonably and with clean hands. Its power and mastery of invention and the flexibility of its arm enable it to fit an infinite variety of situations successfully where otherwise wrongs would go unrighted. Pomeroy, Eq. Jur. 109. Its administration is guarded and guided by precedents, which, by judicial policy, fence in its operations more or less closely according to subjects; but in its nature it is expansive, and so may break away *ex necessitate* and set a new mark to meet a new situation, and does not hesitate to do so when otherwise just rights would fail of vindication. *Land, L. & L. Co. v. McIntyre, supra.*

There are reasons which challenge our attention in support of each of the alternatives mentioned in the last-stated principle. Which of them was in the judicial mind of the court below, in ordering judgment upon the facts found, we are not informed. It decided that there was no collusion between the school-district officers and the judgment creditor, permitting the entry of the latter's judgment. We must assume, in view of all other facts found, and the undisputed evidence, that the learned circuit court intended by that that there was no actual concert of action having a specific wrongful purpose in view, hence that relief could not be granted under that familiar head of equity jurisprudence relating to relief from judgments fraudulently entered. In that light the court must have grounded the judgment on constructive fraud, deeming the general principles suggested in our second alternative ample under the circumstances to call equity power into action. It certainly would seem strange if, facing the established doctrine that equity stands guard over the rights of taxpayers to prevent threatened unlawful disbursement of

public money, and even to follow it when unlawfully disbursed and compel its restoration to the rightful owner, we were compelled to confess that, if unfaithful officers permit fictitious claims to be incorporated into a judgment, the jurisdiction of equity can then be challenged to say that the mere change of form has not been effective to make that right which was before wholly wrong, at the suit of the parties indirectly affected, who have had no opportunity, prior to the change, to act in the matter, and thus prevent the consummation of a wrong. In our judgment there is no such weakness in our system. A judgment is deemed to be right in law, *ex proprio vigore.* True, judgments are, as it were, the words of the law, and are received as truth,—*Judicia sunt tanquam juris dicta et pro veritate accipiuntur,*—but subject to the principle that fraud vitiates everything. In equity that which violates good conscience under all the circumstances may be relievable fraud in the eye of the chancellor, though not characterized by any specific wicked purpose. If it affects a judgment, that may yet stand in form as the infallible truth, *ex proprio vigore,* yet the use thereof be prevented by the jurisdiction of equity. While we may well refer to these principles to show the almost boundless resources of our system to repress and redress wrong, it is believed that we need not necessarily go beyond precedents for the purposes of this case. However, if precedents do not justify our conclusion, it seems that principles will vindicate it.

Respondent claims that the evidence established fraud in fact, notwithstanding the negative decision of the court, and invokes the rule that a judgment, right on the evidence, will not be disturbed on appeal though wrong upon the findings, due exception having been taken to such decision. *Maxwell v. Hartmann,* 50 Wis. 660, 8 N. W. 103; *Witt v. Trustees,* 55 Wis. 376, 13 N. W. 261; *Maldaner v. Smith,* 102 Wis. 30, 41, 78 N. W. 140; *Hamilton v. Menominee Falls Q. Co.*

106 Wis. 352, 81 N. W. 876; *Brown v. Griswold,* 109 Wis. 275, 285, 85 N. W. 363.

Before turning to that alternative to discover whether the judgment complained of has support, we will view it from the standpoint of the trial court. That collection of a judgment, entered by the fraudulent connivance of the plaintiff and the defendant sued in a representative capacity, or the plaintiff and those charged with the duty of guarding the rights of the defendant, may be enjoined by the defendant or any one specially injured, we need not stop to discuss at any great length. The rule in that regard is very old and firmly established. The following are good examples of its application:

In *Nevil v. Clifford,* 55 Wis. 161, 12 N. W. 419, judgment was allowed by the officers of a school district when they knew that there was a good defense to the claim involved and that the taxpayers desired that any attempt to enforce the claim should be resisted. Further reference will be made to that case. Such an action was maintained to enjoin the collection of a judgment in *Smith v. Cuyler,* 78 Ga. 654, 3 S. E. 406. It was said in respect to the right of the persons who apprehended danger from the collusive entry of judgments in actions to which they were not parties but were indirectly interested:

"The apprehended judgments at law will, if collusive, be utterly harmless to these complainants, because, if collusive, the complainants can attack them anywhere and everywhere. A collusive judgment is open to attack whenever and wherever it may come in conflict with the rights or the interest of third persons. Fraud is not a thing that can stand, even when robed in a judgment."

In *Meyer v. Butt,* 44 Ga. 468, 471, it was held that if a trustee collusively permits a judgment to be entered against him, the execution thereof may be enjoined in equity at the suit of the *cestui que trust,* and that if it appears to have been

for the interests of the trustee to permit the judgment to be entered, it will be presumed, in the absence of satisfactory evidence to the contrary, that he acted fraudulently in the matter. In *Hackett v. Manlove,* 14 Cal. 85, it was said that a collusive judgment creditor can be enjoined in equity at the suit of any one specially injured by the fraud, from enjoying his judgment to the prejudice of such other. In *Richardson v. Loree,* 94 Fed. 375, a collusive decree in favor of a person holding receiver's certificates, affecting the underlying bonds upon the property in the receiver's hands, was enjoined at the suit of the bondholders. The fact upon which the fraud was predicated was that the void character of the receiver's certificates was known to the receiver when judgment thereon was consented to by him.

Cases in great number, of the character referred to, might be cited. In some evidence of collusion was direct; in others it was indirect. In some the fraud was actual; in others it was constructive. We find no authority sustaining the doctrine that nothing short of collusion in the entry of a judgment, in the sense of the parties having a specific purpose to commit a fraud, will vitiate the judgment—that fraud in law is not sufficient to render it open to attack in a case of this kind—except *Cicero v. Picken,* 122 Ind. 260, 23 N. E. 763, and some other cases decided by the same court. If we were to approve the rule there laid down, the mere fact that the officers of the school district permitted the judgment to be entered in favor of appellant, under such circumstances as to be chargeable with knowledge that the claim sued upon was invalid, having remained passive in the matter for the purpose of allowing the plaintiff to recover, would not constitute relievable fraud in a taxpayer's action. However, when we come to examine that case carefully, we find that the decision was grounded on a statute which the court construed as preventing any relief from constructive fraud. An examination of the subsequent cases decided by the same court indicates

that the construction thus given to the statute became, in time, somewhat troublesome. It was not always easy, evidently, to appreciate why a statute, merely laying down a rule that where fraud is necessary to an action it must be pleaded as a fact, established by evidence, and found as a fact in order to form a basis for judicial relief, should be said to preclude a person from being successfully charged with fraudulent conduct in the absence of a specific intent to injure, or fraud in fact. In *Hutchinson v. First Nat. Bank,* 133 Ind. 271, 30 N. E. 952, the court said that the declaration in *Cicero v. Picken,* that by force of the statute there is no such thing in Indiana as constructive fraud or fraud in law, might be, as applied to some circumstances, "an overstatement of the law." In other cases it was said, in effect, that the statute merely put the burden of proof in all cases on the party alleging the fraud; that fraud, established and found as a fact, was relievable, though properly classed as constructive fraud. However, the initial case in Indiana, where it was held that a recovery could not be had in circumstances similar to those before us, went upon the ground that only constructive fraud at most was established, and that fraud in law was not sufficient, in view of the statute, to warrant relief.

We need not stop to argue that no such statutory rule as that above mentioned prevails here. If there was collusion between appellant and the officers of the school district in the proceedings which eventuated in the judgment, in the sense of concurrent action of such officers with appellant, either by active operations on the part of both, or on the part of one and passive concurrence on the part of the other, enabling appellant to wrongfully obtain the judgment, the latter knowing that there was no foundation for the claim and that the taxpayers of the district desired the same defended against, the judgment is fatally tainted with fraudulent collusion. If such officers ought to have known that the action was not maintainable, yet made no effort to discover the truth and

to defend the district, and though they knew it was the wish of the taxpayers to have a defense made, they aided appellant to obtain his judgment by remaining passive in the matter, they were at least guilty of constructive fraud.

Collusion, to constitute relievable fraud in a case like this, does not require, necessarily, any express agreement between the officers and the claimant to aid the latter to obtain his judgment, or any specific intent to injure. Utter failure of duty on the part of such officers to defend against a known void claim or one which they have good reason to believe is void from a desire to co-operate with the plaintiff to enable him to obtain an advantage over the municipality, all parties concerned knowing that the wishes of the taxpayers are being violated, constitutes guilty collusion within the meaning of the rule rendering a judgment open to attack in equity by the person whose interests would otherwise be sacrificed.

The principles stated governed *Nevil v. Clifford,* 55 Wis. 161, 12 N. W. 419, which was very much like the case before us. Indeed, the facts in the two cases are strikingly similar. In the *Nevil Case* there was a dispute about the right of school officers to incur indebtedness for a schoolhouse. The structure had been completed and accepted so far as official acts by the school officers could constitute acceptance. A school meeting was held thereafter and the subject of paying the amount due upon the contract for the schoolhouse was considered. Adverse action was taken by a majority vote. It was made known that the prevailing sentiment was that any suit brought to enforce the contract should be defended. Thereafter suit was brought upon the contract and the officers, instead of defending, answered admitting the plaintiff's cause of action, thereby enabling him to promptly take judgment before the taxpayers were aware of the existence of the suit. There were allegations in the complaint to the effect stated, and in addition that the district officers acted fraudulently in the matter. Such additional allegations were plainly

predicated on the facts we have stated, as merely inferable therefrom. This court said of the complaint:

"We think the allegations of the complaint, if true, show that the judgment obtained by the *Cliffords* against the school district was obtained without any legal or equitable claim against the district, and that it was obtained by fraud and collusion with the officers of the district; and having been so obtained, the taxpayers of said district, or any one of them, may maintain an action in equity to have such judgment set aside and vacated in order to protect themselves against the levy of a tax for the payment thereof."

In this case, likewise, the indebtedness was contracted without authority of law. The situation was such that the officers of the district and appellant as well were chargeable with knowledge of all the facts. The question of whether the limit of indebtedness had been exceeded was determined by mere computation from facts presumably within their knowledge. They did not need legal assistance to aid them. Advice contrary to obvious facts would not excuse them. They did not act upon advice in fact, as will be hereafter shown. They were actors in contracting the indebtedness, and did it with their eyes open, so to speak. October 20, 1900, a school meeting was called and one of the questions for consideration was whether to vote a tax to the end that such indebtedness might be paid. Such officers were participants in the meeting. By a majority vote those present refused to raise money by taxation to replenish the building fund, thereby clearly indicating that they did not consider the claims valid. Promptly after the meeting appellant purchased such claims and brought suit thereon in his own name, making due service of the summons upon the director and the clerk. The whole conduct of the two district officers upon whom service was made, particularly that of the director who was the active member of the board, the two being in sympathy as it clearly appears with the faction in the district who favored paying the claim at all events, was well and seemingly calculated to

prevent rather than to made a defense to the suit. The misconduct of the director from the time the summons was served till the judgment was entered can hardly be explained upon any other reasonable theory than that of co-operation with the plaintiff. Keeping in mind that it was a matter of common talk in the district that the claims were void because, when the indebtedness was incurred, the limit of constitutional indebtedness for the district had been exceeded, that the voters of the district had, by majority vote, but a few days before the summons was served, made known their hostility to the payment of the claims, and that the district treasurer was opposed to their payment and had officially refused to recognize them as valid, this evidence seems to clearly condemn the director: He testified that the summons was served October 27, 1900; that the school board met November 3, thereafter; that he did not bring up the matter of the suit or consider it necessary to do so; that he did not at any time say anything to the treasurer about the pendency of the suit or care whether he knew of it or not, or say anything to any body in the district in regard thereto who was in favor of defending the suit; that he knew when the work was done that it was claimed that the constitutional indebtedness of the district had been exceeded and that it was common talk that the claims were invalid on that account; that he gave the summons to an attorney without any direction of the board so to do, telling such attorney to defend the case but not telling him upon what ground or saying anything to him about the matter of the constitutional indebtedness of the district having been exceeded when the indebtedness in question was incurred; that the attorney asked him what defense to put in, and that he told such attorney that he did not know; that the attorney asked him if the work the indebtedness represented was actually done, to which reply was made in the affirmative; that he did not want any defense made, though did not so instruct the attorney; that he told such attorney that the

district ought to pay the claim, but that such attorney was to look after the defense. The attorney testified that the whole matter was left to him by the director to use his own judgment whether to put in any defense or not. The treasurer testified that he was not informed of the existence of the suit until after the judgment was rendered, though it was known that he was opposed to the payment of the claims.

The upshot of the whole matter is that instead of the matter of the suit having been brought promptly to the attention of the board by the director at the first opportunity after the summons was served upon him and action taken to defend upon the ground which the members of the board at least had good reason to believe existed, the director assumed to have entire authority in the matter and in the execution of the same. While he went through the empty form of suggesting to the attorney to put in a defense, he did not acquaint such attorney with the facts or conduct himself in the way a faithful officer naturally would if acting in good faith in such a situation. It seems clear that he purposely allowed the suit to go by default, by reason whereof, in the space of thirty days after the refusal of the taxpayers to vote a tax to pay the claims, they were put into judgment without such taxpayers, who were opposed to such payment, or the officer who particularly represented them upon the board, knowing that a suit had been commenced. Why this court's characterization of the facts pleaded in the *Nevil Case* does not apply here we are unable to perceive. In each case the facts indicate cooperation on the part of district officers, with the plaintiff, to incorporate in a judgment invalid claims or claims regardless of whether they were valid or not, contrary to the will of a majority of the taxpayers. If there is any distinction between the two cases, as to essential particulars, it seems that the indications of fraudulent collusion in this case are the most significant. Here, after the refusal of the taxpayers to provide for the disputed claims, the very person who, as the

agent of the district, contracted them and was necessarily familiar with all the facts, bought them up for the evident purpose of enforcing their payment against the will of the district, obviously expecting co-operation with him by the director, and he certainly was not disappointed in that regard. The director co-operated just as effectively and in a manner more clearly indicating, we should say, a disposition to circumvent the wishes of the taxpayers than did the officers in the *Nevil Case*. To our minds the appellants' judgment is fatally tainted with fraudulent collusion. Perhaps, regarding the finding of the trial court as a decision that there was no specific intent on the part of the director to commit a fraud, the determination that there was no collusion between him and *Mark Beach*, might be sustained, though the evidence, as claimed by respondent, indicates quite strongly something worse than mere constructive fraud. Under the Indiana statute, as construed by its court, the findings here would not support the judgment for want of a specific decision that there was fraud in fact. But since the evidentiary facts found and the undisputed evidence clearly establish at least constructive fraud as an inference of fact, and as a matter of law, the contrary inference drawn by the trial court, even if we were to regard it as a finding, even against constructive fraud, could not prevent the judgment complained of being affirmed as it seems that it must be.

By the Court.—Judgment affirmed.

WINSLOW and DODGE, JJ., dissent.

A motion for a rehearing was denied September 29, 1903.

DUDLEY, Respondent, vs. RICE, imp., Appellant.
DUDLEY, Respondent, vs. KUNTZ, Executor, imp., Appellant.

May 8—September 29, 1903.

Bond of guardian: Invalidity: Enforcement as voluntary obligation: Estoppel: Limitations: Discharge of guardian.

1. Where the supposed guardian of an insane person, appointed in an adversary proceeding to which the ward did not consent, gave a bond as required by the statute, conditioned, among other things, to account with the ward when she became of sound mind and pay over to her what was then found to be due, and was thereby enabled to retain possession of the ward's property and receive the income thereof against her consent, the bond, though void as a guardian's bond because the appointment was without jurisdiction, may be enforced as a voluntary obligation in respect to the condition mentioned.
2. In such a case the special limitation provided in sec. 3968, Stats. 1898, as to actions upon guardians' bonds, entered into and formed a part of the contract, so far as the sureties were concerned; and an action against them upon the bond is barred if not commenced within four years after the discharge of the guardian by reversal, on the ground of lack of jurisdiction, of the order appointing him.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

This is an action against the principal and sureties upon a bond given in guardianship proceedings. One of the sureties, John Mitchell, having died after judgment in the circuit court, the defendant *Kuntz,* as executor of his last will and testament, has been substituted in his place as defendant.

The action was referred to John F. Harper as referee, who, after hearing the evidence, made findings to the effect that James Douglas was appointed guardian of the person and estate of the plaintiff, *Marion V. Dudley,* alleged to be insane, by order of the county court of Milwaukee county, March 15, 1892; that on March 19th following Douglas, Mitchell, and *Rice* as sureties executed and delivered a guardianship bond

as required by the statute to complete the qualifications of Douglas as guardian, which was duly approved and filed by the court, the conditions of which bond were as follows:

"The condition of the above obligation is such that whereas, the above-named principal obligor has this day been appointed guardian of the above-named obligee, *Marion V. Dudley,* now, therefore, if the said James Douglas shall make a true inventory of all the estate, real and personal, of his said ward, that shall come to his possession or knowledge, and return the same into the county court of the proper county within such time as the judge shall order, and shall dispose of and manage all such estate according to law and for the best interests of the ward, and faithfully discharge his trust in relation thereto, and also when required in relation to the care, custody and support of the ward, and shall render an account on oath of the property, estate and moneys of the ward in his hands and all proceeds or interest derived therefrom, and of the management and disposition of the same, within one year after such appointment as guardian, and annually thereafter and at such other times as the proper court shall direct; and shall at the expiration of such trust settle all accounts with the county court or with the court having jurisdiction of probate matters in the proper county, *or with the ward if she be of sound mind,* or with her legal representatives, and pay over and deliver all moneys, estate and effects remaining in his hands or due on such settlement, to the person or persons lawfully entitled thereto, then this obligation to be void, otherwise of full force, virtue and effect."

The referee further found that, at the time of his appointment, Douglas had in his hands, as agent of the plaintiff, her entire separate estate, consisting of moneys and securities, amounting in all to the sum of $20,520.58, which remained in his hands after his appointment, and that Douglas received thereafter, and prior to May 10, 1896, as income from said estate, the sum of $4,318.82, making in all $24,839.40; that on October 22, 1894, upon proceedings duly had in the circuit court for Milwaukee county, that court adjudged that the guardianship proceedings were without jurisdiction, and

reversed the order appointing Douglas guardian; that prior to the said last-named date Douglas, as guardian, laid out and expended in good faith, for the benefit of his supposed ward, and without knowledge of the invalidity of his appointment, the sum of $7,567.39, leaving $17,272.01 due from him to the plaintiff, October 22, 1894; that Douglas returned to the plaintiff, May 12, 1895, credits aggregating $12,715, and that thereafter the said sureties paid certain judgments against *Mrs. Dudley* upon which creditors' actions had been commenced against them, and that after deducting all proper credits the amount due from Douglas to *Mrs. Dudley,* with interest to the date of the report, was $4,915.17; that the services of Douglas as guardian were reasonably worth $1,500, but that they could not be allowed because of the invalidity of the guardianship proceedings; that Douglas was discharged as guardian by the order of October 22, 1894; that this action was barred as to the sureties by sec. 3968, Stats. 1898, because not brought within four years from the discharge of the guardian; that the action should be dismissed as against the sureties, but that plaintiff was entitled to judgment against Douglas for $4,915.17 and costs.

Upon a review of the referee's report the circuit court confirmed the same in all respects, except as to the operation of the statute of limitations, and reversed the conclusion of the referee on this subject, and ordered judgment against the sureties as well as against the principal for the sum due from Douglas. From judgment entered in accordance with this conclusion, the sureties separately appeal.

S. A. Connell, for the appellant *Rice.*

For the appellant *Kuntz,* as executor of the estate of John Mitchell, there was a brief by *Ryan, Merton & Newbury,* and oral argument by *E. Merton.*

For the respondent there was a brief by *Sylvester, Scheiber & Orth,* and oral argument by *C. A. Orth.*

The following opinion was filed July 3, 1903:

WINSLOW, J. The appellant sureties contended in the trial court and in this court that the bond in question, having been given in compliance with the requirement of a court which had no jurisdiction in the matter, is void for all purposes; and that even if this be held otherwise, and the bond in suit can be held binding as a voluntary obligation at common law, still the action is barred by the four-year limitation as to actions upon guardians' bonds prescribed by sec. 3968, Stats. 1898. On the other hand, the respondent claims that, while the bond is void as a statutory bond, it is still enforceable as a voluntary bond, and that sec. 3968, *supra,* has no application to it.

The general principle is that a bond not required by statute is binding at common law if given voluntarily for a valid consideration, if it be not repugnant to the letter or policy of the law. 1 Brandt, Suretyship & G. (2d ed.) § 22; *U. S. v. Tingey,* 5 Pet. 115; *U. S. v. Bradley,* 10 Pet. 343. It has also been frequently held that where a bond is required by statute, and one be given voluntarily for a valid consideration running to the wrong obligee, or containing provisions not required by the statute, it may still be enforced as a common-law obligation, if not repugnant to the letter or policy of the law. *Lewis v. Stout,* 22 Wis. 234; *Platteville v. Hooper,* 63 Wis. 381, 23 N. W. 583; *Straw v. Kromer,* 114 Wis. 91, 89 N. W. 821; *Manitowoc v. Truman,* 91 Wis. 1, 64 N. W. 307. On the other hand, it has also been held that, where the execution of a bond has been unlawfully exacted by a court or officer, it is void for all purposes and cannot be enforced because given *in invitum* and not supported by any consideration. This principle has been applied to a bond given by a defendant to dissolve an attachment, where no attachment could lawfully be levied (*Bank v. Mixter,* 124 U. S. 721, 8 Sup. Ct. 718); to a guardian's bond required of a father

when the father was entitled to act as guardian without bond (*Aucoin v. Guillot,* 10 La. Ann. 124); and to a bond required of the warden of a penitentiary when the law required no bond (*State v. Heisey,* 56 Iowa, 404, 9 N. W. 327). In these cases it seems plain that there was absolutely no consideration for the bond, because the principal was by law entitled to every right which he claimed without bond, and hence in law secured nothing by reason of the giving of the bond.

There is also a line of cases of somewhat different character, which hold, in effect, that where an official bond is required by a court, and it appears that there was never any legal appointment of the principal to the office by reason of lack of power in the court to make the appointment, the bond is wholly void, and will not be enforced, even as a voluntary obligation. *Conant v. Newton,* 126 Mass. 105; *Thomas v. Burrus,* 23 Miss. 550; *Crum v. Wilson,* 61 Miss. 233; *Justices v. Selman,* 6 Ga. 432. In the first of the cases last cited a probate court required a bond as trustee of one who was not a trustee, but simply an agent in charge of the property of another by reason of an oral request, and it was held that, as the court only had power to require bonds of trustees under wills or written instruments, the court had no jurisdiction over the parties or subject matter. Hence the bond was not a valid probate bond, and not enforceable as a voluntary bond against the sureties, because such a holding would change the nature of the contract which the sureties intended to assume. The other cases cited were cases where guardians were appointed by probate courts having no jurisdiction to make the appointments at the time they were made.

It is strongly urged that the principle of these cases should govern the case at bar. But here we meet the case of *Hazelton v. Douglas,* 97 Wis. 214, 72 N. W. 637, which was a creditors' action brought against the principal and sureties upon this same bond, and in which this court held on demurrer

that the bond was binding as a voluntary obligation; the only essential difference being that in that case the complaint alleged that the entire property was received by Douglas as guardian by virtue of having given the bond, whereas it appears by the findings in the present case that Douglas had the principal of the estate as agent of the plaintiff at the time of his appointment, and only received the income of the estate, amounting to $4,318.82, during the time he was supposed to be guardian and by virtue of having given the bond. This case is not *res adjudicata* here, because the parties plaintiff are not the same, nevertheless it should not be overruled unless it is plainly wrong, for certainty in legal rules is sometimes a greater desideratum than precision in logic. Upon reconsideration of that case, it must, we think, be admitted (and the admission comes with better grace because the opinion was written by the writer of this opinion) that it is hardly satisfactory, because it relies upon cases coming within the first two classes referred to in this opinion, and does not discuss the line of cases of which *Conant v. Newton,* 126 Mass. 105, is a conspicuous example. Reference to the printed briefs in *Hazelton v. Douglas* shows that these cases were not called to the attention of the court in that case, nor was the argument made. This consideration, however, is only important as explaining the fact that no reference is made to the proposition in the opinion, and cannot bear upon the question of the correctness of the decision. Notwithstanding, however, the meagerness of the opinion, we are not satisfied that the case was wrongly decided.

While not disposed to question the soundness of the proposition laid down in the *Conant Case* as a general proposition, we think the case distinguishable from the case at bar in at least two material particulars. In that case the appointment of the supposed trustee was made upon petition of the beneficiary, who was *sui juris,* and hence the property went into the hands of the principal in the bond with the full consent

of the beneficiary, and, what is more important, the bond is conditioned only to settle his accounts with the court at the expiration of his trust, and pay over the sum found *due on such settlement* to the person entitled thereto. In the present case Douglas was appointed guardian of *Mrs. Dudley* as the result of an adversary proceeding to which she did not consent, and he thereafter held the property and received the income therefrom against her consent, and was enabled to do so by reason of the bond; and the bond provides for the settlement of the guardian's accounts at the expiration of the trust, *either* with the county court *or with the ward,* if she be of sound mind, and that he pay over the amount found due in such settlement. This promise to account with the ward is not found in the Massachusetts bond, either in direct terms or by implication, and its presence in the bond in suit marks a very substantial difference in the two cases. The court in that case could well say that the only agreement was to account in the probate court, and when it appeared that the probate court had no jurisdiction to receive or pass upon such account there could be no liability; but could that be said in the case of an express agreement to account with the ward herself at the expiration of the trust? We think not.

In the present case the supposed guardian retained possession of the property and collected its income for a long period, against the will of the owner, and by reason of the fact that he had given a bond conditioned, among other things, to account with the owner when she became of sound mind and pay over to her what was then found to be due. These facts seem to us to present a persuasive case of estoppel, both as to principal and sureties. The sureties were under no obligation to sign the bond. By doing so, they enabled Douglas to retain and collect the income of the plaintiff's estate under the promise that he would account with her and pay it back to her when she became of sound mind, and we think that they ought not now to be heard to urge lack of jurisdiction in

the court as a means of escaping from this definite agreement. We therefore hold that the bond may be enforced as a voluntary obligation to the extent indicated.

This brings us to the last question in the case, which is not without difficulty. Our statute provides a special limitation with regard to actions on guardians' bonds. Sec. 3968, Stats. 1898, provides as follows: "No action shall be maintained against the sureties on any bond given by a guardian unless it be commenced within four years from the time when the guardian shall have been discharged." The appellants maintain that this provision is controlling in this case, and that this action is barred thereby, because it was not commenced within four years from the date of the judgment reversing the order of appointment. There can be no doubt of the proposition that the guardian was in legal effect discharged when the guardianship proceedings were reversed and held void. *Paine v. Jones,* 93 Wis. 70, 67 N. W. 31.

To this proposition the respondent replies that the bond in suit is not a guardian's bond, and at first blush the reply seems almost conclusive; but a little reflection shows serious difficulty in turning the question off in that summary manner. True, the bond is supported and enforced, if enforced at all, as a voluntary obligation, but when so enforced no new conditions or obligations can be added to it, nor can any be subtracted. The agreements which the parties made must be enforced. Calling it a voluntary bond cannot enlarge its scope. Now, if the provision that no suit could be maintained upon it after four years had been written in the bond, none would contend that it could be enforced after that time, although it failed as a statutory bond for lack of jurisdiction of the court, and was only enforceable as a voluntary bond. Such was the agreement of the parties. They made, or intended to make, a special contract with special liabilities, and those special liabilities were the liabilities provided by the statute, with their accompanying limitation. The argument

is convincing that this special limitation entered into and formed a part of the contract so far as the sureties are concerned. Such was the holding in reference to this very section in the case of *Hudson v. Bishop* (C. C.) 35 Fed. 820, where Justice BREWER states the doctrine more logically than I could hope to state it. The idea is that a contract of suretyship supposed by the sureties to have been made under this statute must be held to have incorporated in it the special provision contained in the statute limiting the liability of the sureties on such a contract. The action is barred not because of the statute of limitations operating on a guardian's bond, but because, in contemplation of law, the parties put this limitation in their contract, and it cannot be taken out of the contract, even though it be now discovered that it never was a guardian's bond.

By the Court.—Judgment reversed, and action remanded with directions to dismiss the complaint as to the appellants.

A motion for a rehearing was denied September 29, 1903.

KRIZ, Appellant, vs. PEEGE and wife, Respondents.

May 8—September 29, 1903.

(1-8) *Married women: Property rights: Construction of statutes: Contracts: Pledge of credit: Separate property or business: Lease to husband and wife: Liability for rent.* (9, 10) *Statute of frauds: Lease by agent without written authority: Possession by lessee: Ratification.* (11) *Appeal: Reversal of judgment as to costs.*

1. Secs. 2342, 2343, Stats. 1898, removing the common-law disabilities of married women to some extent, are entitled to a liberal construction, carrying out broadly the manifest legislative purpose in enacting the same.
2. Under such statutes a married woman has the same right to acquire property of any kind and in any way, and dispose of,

use, or otherwise enjoy the same, that an unmarried female has.

3. The capacity of a married woman to bind herself to pay an indebtedness incurred for property acquired by her is not dependent upon the purpose to which she intends to devote the property or whether she has a separate property or business. She may pledge her credit for anything of value acquired by her in the transaction as freely as an unmarried woman.
4. Where a married woman pledges her credit for property, whether such property be in the form of money or any other thing of value, the only essential to the validity of her contract at law is that the equivalent for the credit extended shall actually pass to and vest in her, devoid of any obligation incurred in the transaction preventing her from enjoying such equivalent as her separate property.
5. A married woman may, at the time of acquiring property and pledging her credit therefor, purpose devoting the same to the benefit of her husband, and the creditor know of that fact and be induced thereby to extend credit to her, and such circumstances, in the absence of any obligation incurred by her in the transaction to so devote it, will not militate against the legal validity of her obligation to pay as promised.
6. The making of a contract by a married woman concerning her separate property or business under the statutes is one thing. The precedent ownership of property or business or contemplation of a business enterprise is not essential to its validity. The making of a binding contract otherwise is a different matter. The disability of the common law as to the latter has not been removed, therefore it is essential to the making of such a contract that the woman have at the time thereof a separate property and intend in the transaction to charge the same.
7. Cases dealing with contracts of married women, authorized impliedly by the statutes, and those dealing with contracts of such women still governed by the common law, should be carefully distinguished, one class from the other, to the end that those where the rules governing the latter have erroneously been cited as governing the former, may not mislead.
8. By a lease of realty made to a married woman and her husband, though she may intend in the transaction to thereby aid him in obtaining a place in which to do business, she acquires as her separate property an undivided one-half interest in the estate, thereby created, as completely as if she were a *feme sole*, and becomes liable at law for payment of the rent reserved. *Citizens L. & T. Co. v. Witte*, 116 Wis. 60, 92 N. W. 443.

9. In case of a lease of real estate for more than one year, executed by an agent of the owner without being duly authorized thereto in writing pursuant to sec. 2302, Stats. 1898, the lessee taking possession of the premises, he thereby becomes the equitable owner of the estate, in form created thereby, subject to the terms of the lease, and is legally liable for the rent reserved, at least so long as he enjoys the property.
10. Where a lease is signed in the manner indicated in the last foregoing paragraph, the person purporting to have authority as agent not having such in fact, if the lessee takes possession and pays rent, the owner receiving the same with knowledge of the facts, he thereby gives original validity to the transaction as creating a property right to a lease good at law in conformity to the terms of the agreement.
11. A judgment for costs being rendered in form in favor of two defendants jointly, one being entitled to such judgment and the other not, on appeal therefrom, there being no disclosure in the record enabling the court to adjust the rights of the parties in respect thereto, the entire judgment must be reversed and the cause remanded for a proper judgment.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Reversed.*

Action to recover the balance due upon a lease. The cause was tried by the court.

Facts were found in effect as follows: October 25, 1892, under a written lease, the relation of landlord and tenant was in form created between plaintiff and defendants in respect to certain real estate in the city of Milwaukee. Plaintiff's son assumed authority to represent him in the matter. The father was in a sanitarium and the son had charge of his business. The term of the lease was five years. Defendants were husband and wife at the time of making the same. They became joint lessees and promisors. Plaintiff, subsequent to the making of the lease, recognized the same as binding upon him and collected the rent. Defendant *Ernst J. Peege* occupied and enjoyed the premises from about November 1, 1892, till August 1, 1894. $1,094.99 of rent was paid prior to August 1, 1894. The lease was terminated by the acts of the

parties on such date. $1,430.01 of the rent was then unpaid, and no part of it has since been paid. The rent was payable in instalments of $125 on the 1st day of each month in advance. This action was commenced May 29, 1902. More than six years had then elapsed since all the instalments of rent unpaid became due and payable except those due June 1 and July 1, 1894, respectively. Before this action was commenced *Ernst J. Peege* was in due form of law discharged from his debts provable in bankruptcy, including the one in question, by the federal court. *Annie Peege* resided with her husband at the date of the lease and so continued to reside while it was in force. During such time she had no separate property, business, or individual earnings. She was wholly supported by her husband. She signed the lease wholly for the benefit of her husband and to aid him in obtaining a place in which to do business.

On such facts the court decided that plaintiff had no cause of action and dismissed the complaint with costs. Judgment was entered to that effect.

For the appellant there were briefs by *Lenicheck, Fairchild & Boesel,* and oral argument by *F. T. Boesel.*

For the respondents there were briefs by *Van Wyck & Groth,* attorneys, and *Howard Van Wyck,* of counsel, and oral argument by *Howard Van Wyck.*

The following opinion was filed May 29, 1903:

MARSHALL, J. Appellant challenges the finding that *Mrs. Peege* signed the lease to benefit her husband and to aid him to obtain a place in which to do business. We do not deem that material since it appears that she at least obtained an equitable right to an undivided one-half interest in the estate for years by the lease, a valuable property right, which, under the statutes (secs. 2342, 2343, Stats. 1898), she had a right to obtain and agree to pay for regardless of any fact found by the court, as the following will show.

This court, and those of other states having systems similar to ours, have held that a married woman may acquire property of any kind and pledge her credit therefor, binding herself at law, and do so whether she has any separate property or business at the time of such acquirement. Most courts have gone so far as to hold that such right and responsibility are not dependent upon what use she intends to put the property to after acquiring it. *Dayton v. Walsh,* 47 Wis. 113, 2 N. W. 65; *Gallagher v. Mjelde,* 98 Wis. 513, 74 N. W. 340; *Citizens L. & T. Co. v. Witte,* 116 Wis. 60, 92 N. W. 443; *Stack v. Padden,* 111 Wis. 42, 86 N. W. 568; *Schofield v. Jones,* 85 Ga. 816, 11 S. E. 1032; *Wineman v. Phillips,* 93 Mich. 223, 53 N. W. 168; *Tillman v. Shackleton,* 15 Mich. 456; *Ackley v. Westervelt,* 86 N. Y. 448; *Westervelt v. Ackley,* 62 N. Y. 505; *Cookson v. Toole,* 59 Ill. 515; *Orr v. Bornstein,* 124 Pa. St. 311, 16 Atl. 878; *Hibernian S. Inst. v. Luhn,* 34 S. C. 175, 184, 13 S. E. 357; *Building & L. Asso. v. Jones,* 32 S. C. 313, 10 S. E. 1079; *Sidway v. Nichol,* 62 Ark. 146, 34 S. W. 529; *Wilder v. Richie,* 117 Mass. 382; *Nourse v. Henshaw,* 123 Mass. 96.

The reasoning of those cases is well summed up in *Wineman v. Phillips,* to which the learned counsel for appellant refer, substantially thus: The statute conferring upon a married woman the right to take the title to property and enjoy the same as if she were unmarried, and the one conferring the new right to her individual earnings, except for labor performed for her husband, carry with them, necessarily, the right to acquire property with as much freedom from common-law restraints as they do the right to enjoy and dispose of the same. The present chief justice read the same broad meaning out of our statute in the recent case of *Citizens L. & T. Co. v. Witte, supra.* That the emancipation from their common-law disabilities, as regards property, has no restriction requiring a person who deals with one of them specially to inquire whether she has a separate property or

business or whether she intends to devote the property acquired to any such business before extending credit to her, is manifest from the plain ordinary meaning of the statute:

"Any married female may receive by inheritance or by gift, grant, devise or bequest from any person, hold to her sole and separate use, convey and devise real and personal property and any interest or estate therein of any description, including all held in joint tenancy with her husband and the rents, issues and profits thereof in the same manner and with like effect as if she were unmarried." Sec. 2342, Stats. 1898.

Plainly, the right thus granted has no qualifications expressed therein. On the contrary the idea that any qualification was in the legislative mind is strongly negatived by the general scope of the grant. If so, courts should give that effect to the statute. True, as has been said, it is a remedial law and courts should therefore not endeavor to so construe it as to preserve to any extent those common-law disabilities which the legislature plainly intended to remove. The broad, comprehensive, unqualified power includes, by reasonable if not necessary inference, all the rights in regard to the acquirement, enjoyment, and disposal of property which an unmarried woman possesses. The idea that seems still to be read out of the decisions of this court, that the statute means something less than that, that a married woman's right to acquire property is dependent upon the use to which she intends to devote the same, or whether she has a business or separate estate at the time of incurring the indebtedness for property, may not be wholly without warrant, but if so we wish to declare emphatically that such is not the view of the statute entertained here. Unless it can be reasonably said, and of course it cannot, that a married woman cannot bind herself by contract for the acquirement of property except upon condition that she has a separate estate or intends to devote the property to a business already possessed by her, or which she purposes entering into, then, obviously, there are

no such restraints upon the liberty of contract as regards married women. She may acquire property of any kind and pledge her credit therefor, the same as an unmarried female. Her creditor is not obliged, in contracting with her, to inquire to what use she intends to devote the property and part therewith upon the faith of her assurance, or be in danger of loss from her disability to bind herself by contract. The only essential to the validity of her contract obligation is that the property shall pass to her as an equivalent for the credit given. Instantly upon that occurring she becomes the legal owner of the *res* for any and all purposes, and legally liable to pay for the same. She may keep it for her personal use or not use it at all, or devote it to the benefit of others with or without compensation, or change it for other property, or give it away, or do anything else therewith in any of the ways that an unmarried woman may enjoy property. With her new express rights she took the incidental responsibilities that accompany similar rights possessed by others. The idea that she can acquire property or take possession of it and be free from legal responsibility has no support in the language of the statute or in the authorities, that we are aware of. The court of appeals of New York, speaking on the subject, used this language:

"A married woman, although she carries on no business on her own account and has no separate estate, is liable like a *feme sole* for her debts contracted in the purchase or leasing of real estate or other property." *Ackley v. Westervelt,* 86 N. Y. 448.

A brief history of the significant cases heretofore decided by this court will be of assistance hereafter. In *Dayton v. Walsh,* 47 Wis. 113, 2 N. W. 65, it was distinctly held that a married woman may acquire property on credit whether she has a separate estate at the time thereof or not. Yet the argument in support thereof is pointed to as justifying the idea that a married woman must have either property or

business, or prospect of business, as a basis of credit extended to her, or she will not be bound at law. These illustrations were given:

"If she have a separate estate, it would not be claimed that she could not purchase real or personal property, either for cash or on credit, to use in carrying on trade or business, and increase her profits."

"Suppose a married woman is a seamstress, having no estate of her own: may she purchase a sewing machine by means of which she may increase her earnings and make her labor more profitable? Or if she be a music teacher, may she buy a pianoforte upon which she may give music lessons? Does not the law allow her to buy these things on credit, and acquire a separate estate by her earnings? It seems to us it does. It is but another application of the same principle to permit her to lease or buy a house on credit, in which she may keep a private school," etc.

There was no intention, as is plainly indicated, to restrain the meaning of the statutes under discussion so as to minimize their effect in any way. On the contrary, care was taken to point out that they are remedial in character and should have a liberal construction to the end that married women may possess all the rights expressly given to them thereby, and all those which, by reasonable implication, are suggested by such express rights. It will be noted that in all the cases cited in *Dayton v. Walsh,* and all cases decided before the statute of 1872 (Laws of 1872, ch. 155), giving to married women the benefit of their individual earnings other than while working for her husband, where debts contracted by such women were held binding at law, the obligation related to carrying on a business of some sort, or related to a separate estate already possessed. *Conway v. Smith,* 13 Wis. 125; *Todd v. Lee,* 15 Wis. 365; *Leonard v. Rogan,* 20 Wis. 540. In *Krouskop v. Shontz,* 51 Wis. 204, 8 N. W. 241, after a pretty thorough review of most of the previous decisions of the court on the subject, and of those of other states where

statutes similar to ours exist, in an opinion by the present chief justice, this broad doctrine was declared:

"The rights, powers and remedies expressly given to a married woman by the statute, include within them, by necessary implication and as incident thereto, the legal right and power of doing such things, making such contracts and resorting to such remedies as are necessary or convenient to the beneficial enjoyment of the rights, powers and remedies thus expressly given."

No court has gone further than that or stated the letter and spirit of the statute more concisely and clearly. However, the case there in hand was one involving an indebtedness of a married woman contracted in respect to a separate property and business which she possessed, and the scope of the decision has, at times at least, inferentially been restrained to circumstances of that character, though it is apparent that the court then endeavored to plainly display the full scope of the statute, so that no mistake in respect thereto could thereafter reasonably occur.

In *Bouck v. Enos,* 61 Wis. 660, 21 N. W. 825, the liability of a married woman upon a promissory note given by her for money loaned to be used in a business then possessed by her and her husband, she having signed the note with him, was called in question. In the court below the point was made, by a request for an instruction to the jury, that the plaintiff could not recover unless the money borrowed was actually used for the benefit of the defendant's separate estate. The court held that the rejection of the instruction was proper because the lender of the money was not responsible in any way "for the particular application of the money after it was borrowed," and barred from a recovery because the wife used the same for some purpose other than her own. The court was not called upon there to decide whether notice to the lender at the time the money was loaned that the borrower did not intend to use the same for her own benefit, would

militate against her liability. However, the guarded language of the court in deciding the point actually presented might suggest to some the idea that such notice in such a case is a material matter.

In *T. T. Haydock C. Co. v. Pier,* 74 Wis. 582, 43 N. W. 502, in an opinion by Mr. Justice TAYLOR, involving a contract clearly outside of the statutes, it was said of the decisions of the court up to that time, that the effect thereof is that a married woman is still under the disabilities of the common law, "in all transactions which do not relate to her separate estate, her separate trade or business, or to contracts relating to her personal services." That was accurate, yet it admits, reasonably, of being understood this way: That contracts not made with reference to a separate estate or business presently possessed, or at least to a business to be entered upon, are not within the statute. That idea was brought out more fully in *O'Malley v. Ruddy,* 79 Wis. 147, 48 N. W. 116. The indebtedness involved there was incurred by the husband for goods and money furnished to the husband for use in support of his family. A note was given therefor signed by him and his wife. It was not given, it will be seen, for any property acquired by the wife or in respect to the enjoyment of any property or business possessed by her, or which she had in contemplation. It was clearly outside of the statute and the court so decided. However, instead of grounding the decision on the fact that the indebtedness was not based on the right to acquire and enjoy property, the essentials of equitable liability were referred to as the essentials of legal liability under the statute. The right of a married woman to charge her separate estate seems to have been the turning idea. The court, by Mr. Justice LYON, said:

The debt was that of "Austin Ruddy alone and his wife could not bind herself to pay therefor, unless she had a separate estate or business. There is no proof or claim that

she had either. She was therefore under the common-law disability of coverture, and hence her signature to the note did not create an indebtedness against her. The cases determined by this court in which it is so held are quite numerous and entirely uniform. Some of them are cited in the opinion of Mr. Justice CASSODAY in *Krouskop v. Shontz,* 51 Wis. 204 [8 N. W. 241.] In all the cases in this court cited by counsel to maintain the opposite doctrine the wife had a separate estate or business. It must be held that the mortgage debt was the debt of Austin Ruddy alone."

In reading that case it must be remembered that a married woman's contract, made with specific intent to charge her separate property, is not governed by the statutes. A married woman may make such a contract whether it concerns her separate property or business or not in the statutory sense, the same now as at the common law, but it is necessary that she shall possess a separate estate in order to do so. Obviously, without such, she cannot make a contract intending to charge her separate estate. *Mueller v. Wiese,* 95 Wis. 381, 70 N. W. 485.

In *Fuller & Fuller Co. v. McHenry,* 83 Wis. 573, 53 N. W. 896, the question involved was whether husband and wife may do business as partners, and if not, what the legal results are, as regards property rights and responsibilities, in case they do so in form. In reaching the conclusion the power of a married woman to bind herself at law by contract was discussed, and some of the previous decisions of this court were cited. It seems that there the distinction between the right of a married woman to charge her separate property with obligations having no concern with the acquirement or disposal of property, or with any separate business interest of hers, and her liberty as to property rights under the statute, was not kept in view. It was said that the purpose of the enabling act removing the disabilities of married women was merely to render contracts in regard to their

separate property, which were at common law good only in equity, legal obligations. This language was used:

"Her contracts were void at law and enforceable only in equity against her separate estate. The statute changed the former equitable ownership of her separate estate into a legal one. . . . It has been repeatedly held under this statute that the contracts of a married woman, when necessary or convenient to the proper use and enjoyment of her separate estate, are binding at law, and that all her other contracts and engagements stand, as before the statute, good only in equity, and that the change from an equitable to a legal estate has not, in respect to such other contracts, enlarged her powers or removed the disability of coverture. The power of a married woman to bind herself at law is a restricted one and limited to the making of such contracts and agreements as are necessary or convenient to the use and enjoyment of her separate estate."

Much further discussion was indulged in, followed by this result:

"The conclusion at which we have arrived is not in conflict with *Krouskop v. Shontz,* 51 Wis. 204 [8 N. W. 241], where the real estate upon which farming was conducted by husband and wife was her sole property, and she was held liable for that reason."

Thus it will be seen that the idea was conveyed, at least in one view, that a married woman can make no contract under the statute that she could not make at the common law, and that since she could not at common law make a contract except in respect to property possessed by her at the time of incurring the obligation, she cannot make a contract now under any different circumstances; that the only change is that, whereas she could formerly bind her separate property only in equity, she can now bind herself at law. The common law did not deal with the contracts of married women made entirely independent of present possession of a separate estate, while the statute gives them the same freedom to acquire

separate estates by their individual contract as it does to unmarried women.

In *Gallagher v. Mjelde,* 98 Wis. 509, 74 N. W. 340, it was again announced without qualification, by the present chief justice, citing *Dayton v. Walsh,* 47 Wis. 113, 2 N. W. 65, and *Krouskop v. Shontz,* 51 Wis. 204, 8 N. W. 241, that a married woman having no separate estate may acquire one upon the basis of her credit alone. True, nothing was said as to whether the right is restricted by the purpose in view in acquiring the property, but it is plain that the court did not have in mind that there was any such restriction.

In *Hollister v. Bell,* 107 Wis. 198, 83 N. W. 297, again, the words were repeated, "A married woman has not capacity to bind herself at law by contract except as regards her separate property or business," the court having in mind contracts with the purpose of charging separate estate, distinct from contracts made in the acquirement, use, and enjoyment of separate estate. There was no question that the one under consideration did not belong to the latter class. The question was, Did it belong to the former? It was held, following *Mueller v. Wiese,* 95 Wis. 381, 70 N. W. 485, and *Emerson-Talcott Co. v. Knapp,* 90 Wis. 35, 62 N. W. 945, that it did, and was enforceable only in equity to charge the separate estate. It is there also held, inferentially, that had the contract belonged to the second class mentioned, it would have been essential to its being binding that there should have been a separate estate to be charged at the inception of the obligation.

In *Stack v. Padden,* 111 Wis. 42, 86 N. W. 568, the action was at law and the claim was made that the defendant contracted the debt intending to charge her separate property. It was said that such a contract is not within the statute; that to be such the contract of indebtedness must be one concerning separate property, business, or personal services; that en-

joyment of property, so far as regards mere basis for credit, is not within the statute. Accumulation and use of property, with the incidental right to make all contracts in that regard, are within the statute.

Citizens L. & T. Co. v. Witte, 116 Wis. 60, 92 N. W. 443, contains the last expression of the court on the subject under discussion. There the implied powers of a married woman to acquire property upon credit or otherwise was stated very broadly, it being held that such right is not dependent upon possession, when incurring the obligation, of property or business, or a purpose to enter into business; that the validity thereof is to be determined wholly by the nature of the obligation itself as regards whether it is one for the acquirement of property or the enjoyment thereof as an equivalent for the credit. We should say in passing that in writing the opinion in that case the amendment to sec. 2342, R. S. 1878, made in 1895 [Laws of 1895, ch. 86], whereby any conveyance, transfer, or lien, executed by either husband or wife to or in favor of the other, is now valid the same as between other persons, was not quoted or noticed, the contract involved having been made before such amendment.

The trend of the decisions elsewhere will fairly appear from the following statement of the substance of a few of them: A married woman, under her general power to acquire a separate estate, may borrow money and bind herself at law by her note given therefor, regardless of what use she intends devoting the same to which is not known to the lender. *Hibernian S. Inst. v. Luhn,* 34 S. C. 175, 13 S. E. 357. The liability of a married woman on her contract is fixed by its nature, not by what she may do with the proceeds thereof. If it is made to acquire property for herself, she becomes bound thereby at once, regardless of what she may do with the property. *Rigby v. Logan,* 45 S. C. 651, 24 S. E. 56. Where title to property vests in the wife as an equivalent for

her obligation incurred, her statutory right to acquire property is exercised and a legal liability arises. *Tillman v. Shackleton,* 15 Mich. 447. Judge COOLEY there remarked, in effect, that the beneficent statute emancipating married women from common-law disabilities should not be strictly construed with a view of minimizing its effect and preserving as much of the old system as possible, which was plainly intended to be done away with, but should have the liberal construction due to a remedial statute. A married woman is bound at law by contract whereby she obtains title to property herself upon her credit, as well as when she contracts indebtedness in any other way concerning property or business. Her liability becomes fixed by the title to the property passing to and vesting in her, becoming her separate estate. Her undertaking is to pay for her separate property. *Chamber of Commerce v. Goodman,* 110 Mich. 498, 68 N. W. 295. The contract of a married woman, as regards property owned by her or acquired by her in the transaction, is binding upon her at law the same as if she were a *feme sole.* She may borrow money, taking title thereto herself, or acquire any other property upon credit, whether she has a separate estate or not at the time of incurring the obligation, and her promise to pay for the property is binding the same as that of any other person. *Sidway v. Nichol,* 62 Ark. 146, 34 S. W. 529, overruling some previous cases decided by that court. The note of a married woman, given for property acquired by her, is binding upon her at law whether such property be money or some other thing of value, and regardless of what her purpose is at the time of the acquisition, as regards what she intends to do therewith, or whether the creditor has notice that her purpose is to apply the property for the benefit of her husband. *Wilder v. Richie,* 117 Mass. 382. The only essential to the legal obligation of a married woman to pay for property obtained by her on credit is that the agreed

equivalent for the debt shall actually become her property unfettered by any obligation, binding as between her and her creditor, to devote it to any one but herself. She may purpose devoting the property to the benefit of her husband after it becomes hers, and knowledge thereof by the creditor may be an inducement to the extension of credit, and still the legal liability will not be impaired, so long as she incurs no obligation in the transaction inconsistent with an absolute control by her over the property as her own. *Nourse v. Henshaw,* 123 Mass. 96. A married woman, having the right to acquire and enjoy property, and the right to her personal earnings the same as if she were a *feme sole,* has the same right as an unmarried woman to bind herself at law by note, for borrowed money, or anything of value acquired by her as an equivalent therefor. If she has no estate she has a right to acquire one. She may do that, pledging her integrity for the payment thereof, the same as any one else. Such is the plain purpose of the statute removing her common-law disabilities. *Orr v. Bornstein,* 124 Pa. St. 311, 16 Atl. 878.

The conclusion from the foregoing is irresistible that the possession by a married woman of a separate estate or busines, or contemplation by her to engage in business, is not essential to her statutory right to contract, as regards the acquirement of property; that while separate estate is essential to the making of a contract by her merely to charge her separate estate, binding in equity, it is not to make a contract authorized by the statute; that she may incur indebtedness binding upon herself at law, for property vesting in her at the time of the transaction, and that what she may then intend to do therewith, or what she may do therewith in fact, or what information the creditor may have on the subject, so long as he actually parts with, to her, an equivalent for the credit extended, with no restraints upon her as to what she shall do with such equivalent, does not militate against her

liability, the contract being within the plain purposes of the statute.

The point is made by respondents' counsel that appellant is not entitled to recover in any event because the lease was void, being for a term of years, and not signed by appellant or by his agent duly authorized in writing, as required by sec. 2302, Stats. 1898. We are unable to perceive any merit in that proposition. The possession of the property taken under the lease was the possession of the lessees. Appellant ratified the act of his son in making the lease, which made a good contract for a lease, enforceable in equity as from the date thereof, and binding upon appellant at law as regards the rent, so long as the enjoyment of the property actually continued. The cause of action sued upon was for such rent only.

The foregoing covers all the assignments of error and all the reasons assigned why the judgment should be reversed, and also all the reasons advanced by respondents' counsel why the judgment should not be disturbed, except as to *Ernst J. Peege,* which will be presently noticed. Appellant's counsel seem to submit to the decision of the trial court that the statutes of limitations extinguished appellant's claim except as to the instalments of rent due June 1 and July 1, 1894, each being for $125; also that the entire claim was extinguished as to *Ernst J. Peege* by his discharge in bankruptcy. Therefore the complaint should have been dismissed in the court below as to the latter, with costs in his favor, and in the same judgment recovery should have been granted plaintiff against *Mrs. Peege* for $250 with interest on one half thereof from June 1, 1894, and on the other half from July 1, 1894, with costs. A judgment for $46.09 was rendered in form in favor of both respondents generally. We have no way of telling what part thereof belongs to one and what part to the other. The judgment is inseparable, from

any information before us, therefore it is considered that the entire judgment should be reversed and a proper judgment entered.

By the Court.—So ordered, judgment for costs in this court to go in appellant's favor for clerk's fees only since he in effect prevails against one respondent and fails as to the other.

A motion by the appellant for a rehearing was denied September 29, 1903.

ILLINOIS STEEL COMPANY, Respondent, vs. JEKA and wife, Appellants.

May 9—September 29, 1903.

Adverse possession: Presumptions: Continuity: Parol transfers: Court and jury.

1. Actual, continuous, exclusive possession of land by a person and his privies in estate for twenty years, unexplained, creates a presumption of fact that such possession and its commencement were characterized by all the requisites to title by adverse possession, and that the title of the adverse claimant is perfect.
2. Transfer of possession from one occupant to another may be by parol merely, without destroying the continuity of the adverse possession.
3. The evidence in this case, though tending to show (by such facts as the execution of bills of sale of the house instead of deeds of the land) that the claim of defendant and his grantors was not at all times adverse, is *held* not to justify the court in taking from the jury the question of adverse possession.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

This is an action of ejectment, commenced July 1, 1897, to recover possession of a small lot—being a part of govern-

ment lot No. 2, fractional section 33, town 7, range 22 east—situated in the Fifth ward of the city of Milwaukee. The lot in question is 125½ feet in length by 33 feet in width at one end and 39½ feet at the other. Government lot No. 2 aforesaid was a part of what is known as "Jones Island"—a low, marshy piece of land between the original channel of Milwaukee River and Lake Michigan, in the city of Milwaukee, a full description of which will be found by reference to the case of *Illinois Steel Co. v. Budzisz,* 115 Wis. 68, 90 N. W. 1019. The lot in dispute here is situated very near the lot in controversy in the last-named case, and lies within the limits of block 195, referred to in that case, and the street immediately north of said block. The defense relied upon in the present case was adverse possession for twenty years.

Upon the trial the plaintiff proved record title in itself of said government lot No. 2, and also proved that the lot in dispute was a part of said government lot, and it was admitted that the defendants were in possession of the same at the time of the commencement of the action. Thereupon the defendants introduced evidence to substantiate their claim of adverse possession. This evidence tended to show that in 1874 one John Stin, with his wife, Eva, and one son Joseph, then being twelve years of age, went to Jones Island to live, and lived in the house of one Patek about a year; that in the spring of 1875 the father built a house on the premises now in dispute, the same being then partially submerged and not fenced; that the father was drowned in the fall of that year, and that his widow and son continued to live in the house, and during the year 1876, with the help of relatives, filled a considerable space around the house with sand, gravel, and ashes, so as to make the lot above the surface of the water, which lot they inclosed with a fence during that year, which fence remained in the same place till the commencement of this action, and included the premises in dispute; that John Stin declared when he built the house that he would fill up

the ground and that it would be his; that about a year after Stin's death his widow married one Cinova, who thereupon came to live in the house built by Stin; that the son Joseph lived with his mother and Cinova in the house for about three years, and then left and boarded in the city of Milwaukee, and allowed his mother to remain in the house without rent, and that the mother and Cinova continued to live on the property till the year 1884, when the mother negotiated a sale of the premises to one Adam Paczocha for $300; that, upon making this sale, Eva and her husband made a bill of sale of the house, September 1, 1884, and received $300 from Paczocha, and surrendered possession to him; that soon after this the son Joseph, through his guardian, claimed that Paczocha must pay rent to him, and afterwards a settlement was made between Paczocha, Eva, and Joseph, by which $200 of the $300 consideration was turned over to Joseph, and Joseph executed a bill of sale of the house in December, 1884, to Paczocha; that from the time of John Stin's death up to the time of the sale to Paczocha the property was claimed by Eva and Joseph as the homestead of the family; that Adam Paczocha bought the premises for his father, Joseph, and a short time after the purchase from Eva turned the same over orally to his father, who paid him therefor; that both Adam and Joseph Paczocha were informed by Eva that they bought the lot as well as the building; that Joseph Paczocha remained in possession after the purchase, and made further filling of the lot, and in 1891 gave the appellant *Michael Jeka,* his son-in-law, permission to build a house on the west part of the lot, which he did and has ever since occupied the same as his home. Upon rebuttal the plaintiff introduced evidence tending to show that all that Eva and Joseph claimed to own was the building, and also introduced a lease dated in 1876, purporting to be signed by Eva Stin by a mark, in which she acknowledged that she occupied a part of block 195 as tenant of the plaintiff. The signature, however, was not identified

by any one as having been made by Eva, and she stated upon surrebuttal that she did not remember ever having signed it.

The trial court, upon motion, directed a verdict for the plaintiff, and the defendants appeal.

For the appellants there were briefs by *Fiebing & Killilea* and *M. C. Krause,* and oral argument by *O. J. Fiebing.*

For the respondent there were briefs by *Van Dyke & Van Dyke & Carter,* and oral argument by *W. E. Carter.*

The following opinion was filed May 29, 1903:

WINSLOW, J. From the foregoing statement of the evidence offered by the defendants, it is evident that it was error to take the question of adverse possession from the jury. This evidence tended to show that the defendants and their privies in estate had held actual possession of the premises in dispute for more than twenty years prior to the commencement of this action. It was not necessary to show that there was paper evidence of transfer of possession from one to the other; the transfer may be parol and satisfy the requirement of continuity.

It is now well settled in this state that, when there has been continuous occupancy for twenty years, the presumption is then raised that such occupancy was under claim of right, and adverse to the world. *Bishop v. Bleyer,* 105 Wis. 330, 81 N. W. 413. This principle was expressed in *Illinois Steel Co. v. Budzisz,* 106 Wis. 499, 514, 82 N. W. 534, as follows:

"Actual, continuous, exclusive possession for the statutory period, unexplained, displaces the presumptions in favor of the true owner, and creates a presumption of fact that such possession and the commencement of it were characterized by all the requisites to title by adverse possession, and that the title of the adverse claimant is perfect. The statute so provides."

When such continuous possession has been shown, it devolves upon the other party to show by evidence that it was

not in fact adverse. Such fact may, of course, conclusively appear by cross-examination of the adverse claimant's own witnesses, but when such is not the case the other party must produce the necessary evidence. In the present case, while there were some facts brought out in the defendant's case which tended to show that the claim of defendant and his grantors was not at all times adverse, such as the execution of bills of sale of the house, instead of deeds of the land, we are not able to say that they were so strong as to justify the court in taking the case from the jury; nor was there anything conclusive on the subject introduced by the plaintiff in rebuttal. The question was one for the jury, under proper instructions.

By the Court.—Judgment reversed, and action remanded for a new trial.

A motion for a rehearing was denied September 29, 1903.

GRUNERT, Respondent, vs. BROWN and another, imp., Appellants.

June 2—September 29, 1903.

Pleading: Cause of action: Wrongful cutting of timber: Action for trespass or for subsequent conversion? Limitation of actions: Dismissal as to part of the defendants.

1. Where a complaint makes no attempt to state several separate causes of action, it must be construed as being intended to state some particular one of those which might arise out of the facts alleged; and when the intention of the pleader in that respect is ascertained, all other causes of action are excluded.
2. A complaint alleged that defendants wrongfully cut and removed logs from certain lands in which plaintiff's assignor owned an undivided interest, wrongfully manufactured the same into lumber, intermixed it with other lumber, sold and delivered the whole to persons unknown, and converted the

proceeds to their own use; and that plaintiff's assignor suffered damage "by reason of said several acts of conversion." It also alleged that plaintiff's assignor owned an undivided interest in the lumber after its manufacture from the logs. It appeared that the original cutting and removal was done by certain of the defendants, that the logs were made into lumber by their vendee, and that the subsequent sales and delivery of the lumber were the acts of other defendants. *Held*, that the cause of action stated was for the original cutting and taking of the logs, the defendants not participating in such trespass being joined pursuant to sec. 4269, Stats. 1898, as being purchasers with notice.

3. The action in such case was barred if not commenced within six years after the date of the original trespass; and a dismissal as to all defendants except those who had been guilty of a subsequent conversion of the lumber could not alter the nature of the action or change the date from which the limitation began to run.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

On September 26, 1891, Bray and Choate claimed to be owners in fee of certain lands in Oneida county, of which, however, one Coleman was in fact owner of an undivided one-quarter by the same title which was involved in the case of *Grunert v. Spalding*, 104 Wis. 193, 80 N. W. 589. On that date Bray and Choate, by warranty deed, sold to one A. D. Smith all the pine timber growing upon said lands, both parties in good faith assuming that the grantors were such owners. Said Smith, in partnership with Charles F. Smith, cut said timber into logs, and later removed them from said premises, prior to May 1, 1892, when such logs, mingled with a large amount of other logs, were sold to the Eagle Lumber Company, which company, between that date and about November 1st, manufactured all of said logs into lumber, and piled the same for drying in its lumber yards, so that the lumber made from the logs cut from the land in question was inextricably mingled with the lumber from an equal or larger amount of other logs. After November 1, 1892,

the appellants, *Flanner* and *Brown,* under a commission contract with the Eagle Lumber Company, negotiated sales for such of said lumber as had not previously been sold in the log by that company, and superintended the sorting, grading, and shipping out of all of the lumber in the yards to various persons, most of them out of the state of Wisconsin.

On September 26, 1898, plaintiff commenced suit, alleging assignment by Coleman to him of all rights of action for the wrongful cutting and conversion of said logs and lumber, or the interest of Coleman therein, and asserting that the defendants, who included the Smiths, Rib River Lumber Company, and *Flanner* and *Brown,* wrongfully cut and removed the logs from said premises, wrongfully manufactured the same into lumber, intermixed the same with other lumber from which it could not be distinguished or separated, and sold and delivered the same to persons unknown, and upon such sale the defendants converted the proceeds to their own use. The defendants admitted the cutting and removal by the Smiths, the sale of the logs to the Eagle Lumber Company, and their manufacture into lumber, and intermingling of same inextricably with other lumber by that company, and the acts of the appellants in making sales and shipments of said lumber on behalf of the Eagle Lumber Company. They also set up the various statutes of limitations.

Upon the trial the plaintiff dismissed as to the Smiths and as to the Rib River Lumber Company, and judgment was entered against the defendants *Flanner* and *Brown* for the stipulated value of Coleman's one-quarter interest in all of the logs cut by Smith from the described lands, from which judgment said last-mentioned defendants appeal.

For the appellants there was a brief by *Hooper & Hooper,* attorneys, and a separate brief by *John Barnes,* of counsel, and oral argument by *Moses Hooper* and *John Barnes.*

H. O. Fairchild, of counsel, for the respondent.

The following opinion was filed July 3, 1903:

DODGE, J. The view reached by this court upon one of the questions presented is so conclusive upon the whole case as to render unnecessary discussion and decision of others, quite numerous, and involving much of difficulty, if not doubt. In *Joseph Dessert L. Co. v. Wadleigh,* 103 Wis. 318, 79 N. W. 237, it was said at the pen of our late Brother BARDEEN: "When a complaint is presented for judicial inspection, it is the court's first duty to ascertain the nature of the cause of action alleged." The reasons for reaching certainty on such question as preliminary to further consideration of the cause were so admirably expressed in that case that nothing can well be added. Upon plaintiff's theory of the facts existing when the complaint was framed, it can hardly be doubted that he had two or more causes of action. First, he was wronged by the original severance and taking of the logs; next, when they came to the Eagle Lumber Company by purchase and it so acted with reference to them as to work an invasion of plaintiff's ownership, and again when the lumber was taken possession of by the appellants and by them shipped away,—if, indeed, there be anything in the facts to convict them of conversion at all. Each of these constituted a distinct wrong against plaintiff, but in which some at least of the defendants did not at all participate, except as by virtue of sec. 4269, Stats. 1898, all subsequent dealers are deemed to be participants in the original severance and taking of the property. *Smith v. Briggs,* 64 Wis. 497, 25 N. W. 558. The complaint makes no attempt to state several separate causes of action. It must therefore be construed as stating some particular one of those which might arise out of the facts which it summarizes. The intention of the pleader as to which one must be ascertained from the document itself in the light of the facts as more amplified by the evidence. When that cause of action is discovered, all others are excluded; for he cannot be permitted to attack with a weapon arranged to "hit if a deer and miss if a calf," as stated in

Joseph Dessert L. Co. v. Wadleigh, supra. It is not enough that he may have stated facts out of which may be spelled one cause of action, if there is also stated another, which is obviously the primary and dominant one. *Klipstein v. Raschein,* 117 Wis. 248, 94 N. W. 63.

It therefore becomes necessary to decide for which of the wrongs committed against the plaintiff this action is brought—whether for the original severance and taking of the timber by the Smiths, or for the alleged sale and shipment of the lumber by *Flanner* and *Brown.* It must at once be conceded that this complaint is more complex and less direct than that considered in *Joseph Dessert L. Co. v. Wadleigh, supra,* but, on the other hand, it presents some *indicia* of the pleader's purpose which were not there found. In that case the single defendant was the person who both cut the trees and disposed of the product. He might have been sued for either act, and there was no joinder of others whose presence was proper to one cause of action, but improper to another, as in the case at bar. Both cases are alike, however, in that in both the wrongful severance and the conversion are alleged—a circumstance which is very significant, for the wrongful cutting of the timber is in no wise essential to the statement of a cause of action for the conversion charged upon the appellants. Title in plaintiff to the lumber sufficed to support that action, without regard to whether the original cutting was in defiance or recognition of his ownership of the land. We do not mean to declare that the allegation that the original cutting and removal of the logs was wrongful and in wilful and deliberate denial of the rights of plaintiff's assignor, would render demurrable a complaint clearly seeking recovery for some subsequent conversion of the lumber, but that it is so unessential to such cause of action, and so essential to a different one, that its presence is highly significant of the pleader's purpose. On the other hand, all the allegations of transactions subsequent to the original taking were

germane and material to an action therefor, such as is authorized by sec. 4269, Stats. 1898, against the original takers and the subsequent handlers. Another element of the complaint is joinder of defendants wholly inconsistent with an action to recover for a conversion of the lumber by the acts of the appellants in selling and shipping it after it had passed through the intermediate possession of the Eagle Lumber Company, and manufacture by them, and after all association of the Smiths therewith had terminated. Such specific act of conversion, if such it was, was committed solely by appellants, and the Smiths were not permissible parties to an action therefor. 2 Addison, Torts, § 543; *Dahms v. Sears,* 13 Oreg. 47, 65, 11 Pac. 891; *Cooper v. Blair,* 14 Oreg. 255, 12 Pac. 370; *Ray v. Light,* 34 Ark. 421, 431. Such joinder is said to be a very significant fact, sufficient to turn the scale in a doubtful case. *Francisco v. Hatch,* 117 Wis. 242, 247, 93 N. W. 1118, 1120. As already pointed out, the joinder of appellants is entirely proper to an action under the statute to recover damages for the original cutting and removal of the timber. *Smith v. Briggs, supra.* Again, it is alleged that plaintiff's damages resulted, not from the final act of selling and shipping the lumber with which alone the appellants had any connection, but from the "several acts of conversion," commencing with the cutting of the timber. Recovery could be had in one action for such several distinct acts of conversion as the evidence discloses, only by virtue of the statute connecting them with the original act.

We do not overlook the fact that the complaint, with some industry, alleges that plaintiff was owner of the lumber at Rhinelander in 1893 and spring of 1894, of which no proof was made. That allegation is doubtless consistent with an attempt to state a cause of action for a conversion of the lumber at or after that time, and is to be given due weight. It serves, however, only to bring the situation within both *Joseph Dessert L. Co. v. Wadleigh,* 103 Wis. 318, 79 N. W.

237, and *Klipstein v. Raschein,* 117 Wis. 248, 94 N. W. 63, where the complaints stated all the facts necessary to constitute the repudiated cause of action, but nevertheless were held not to state it, but a different one. We do not think the presence of this allegation sufficient to overcome the effect of all the other *indicia* of the pleader's main and primary purpose.

For the reasons above stated, we cannot avoid the conclusion that the action when first brought, as defined by the complaint, was one for the cutting and taking away of timber belonging to plaintiff by the two Smiths, to which the joinder of appellants, who did not participate therein, was authorized by sec. 4269, Stats. 1898, making them liable for the damages thence resulting.

This being, then, an action to recover damages resulting from the wrong committed against plaintiff by the wrongful cutting and removal of his timber, which confessedly occurred more than six years before the action was commenced, we can entertain no doubt that the bar of the statute of limitations was complete. That limitation began the moment the cause of action accrued. The cause of action had completely accrued before the delivery of the logs to the Eagle Lumber Company and before they were manufactured into lumber. On any day for more than six years prior to September, 1898, plaintiff might have commenced his action. There is no escape from the obvious conclusion in the fact that some of the parties, who, by virtue of the statute, might become liable to a judgment in that action, were not ascertained until later. That statute carries a right of recovery of damages along and imposes it upon any who may become purchasers with notice at any time before trial, but it is the same cause of action, accrued at the time of the original taking, and becomes barred at the end of six years. If we concede, as plaintiff contends, that he has an election whether he will sue upon one wrong or another in a series of conversions,

he must, but for the statute, sue separately for each, with certainty of expense and possibility of failure to collect in some. Only when he elects to sue for the first wrong can he avoid that peril and join the subsequent conversioners. If he elects to avail himself of that statutory privilege, he must accept the statutory burden of diligence with it.

We therefore conclude that the present action was, at the time of its commencement, barred by the statute of limitations, duly pleaded. The dismissal as to certain of the defendants upon the trial could not change the nature of the action, and transpose the suit into one to recover for another and separate wrong. Judgment for all the defendants should have been rendered upon the facts found.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for the defendants.

Upon a motion for a rehearing there was a brief by *Greene, Fairchild, North & Parker,* attorneys for the respondent, and a brief by *Hooper & Hooper,* for the appellants.

The motion was denied September 29, 1903.

COLE, Appellant, vs. CITY OF WATERTOWN, Respondent.

September 8—September 29, 1903.

Testamentary trustees: Appointment to fill vacancies: Discretion: Intention of testator.

1. In the appointment of trustees under sec. 4027, Stats. 1898, the discretion of the county court is not an arbitrary one, but is to be exercised in such a way as to secure, not merely competent men of integrity, but men who will co-operate harmoniously in the execution of the trust; and effect should be given to the intention of the testator in respect to the persons to be selected, where such intention is expressly declared or is fairly deducible from the language of the will.

2. Thus, where the will provided that in case any of the trustees therein named should die or refuse to accept the trust the county court should be requested to fill the vacancy by appointment, "subject to the approval of the parties interested in" the estate, the court was not justified in appointing a person against the objection and protest of a son of the testator who was one of the executors and trustees named in the will.
3. The intention of the testator should have been regarded in such case, whether the vacancy to be filled was caused by the death or refusal of one of the trustees originally named, or by the death or resignation of a later appointee.

APPEAL from a judgment of the circuit court for Jefferson county: JAMES J. DICK, Judge. *Reversed.*

It appears from the record and the findings of the court that John W. Cole died February 17, 1894, leaving a last will and testament, which was admitted to probate April 4, 1894, wherein, among other things, he devised to his executors and trustees, therein named, certain real and personal property in trust, with directions as to the management thereof, and to pay the net balance of rents and interest to his wife, Eliza C. Cole, and his son, *Oscar A. Cole,* as therein directed, and after their deaths to transfer and convey the same to the city of *Watertown,* in trust for the purposes and on the conditions therein set forth. The will contains this clause:

"Should the persons hereinafter nominated and appointed as executors and trustees, or any of them, die, or refuse to accept the trust, the vacancy thus caused shall be filled by appointment by the county court or the judge thereof for Jefferson county, who is hereby authorized and requested to make the same *subject to the approval* of the parties interested in my estate."

The will also contains the following clause:

"I do hereby appoint my son, *Oscar A. Cole,* C. B. Skinner, and Christian May, all of the city of *Watertown,* executors and trustees of this my last will and testament, with full confidence that they will faithfully and prudently execute the trust hereby reposed in them."

Skinner died prior to the death of the testator. April 20, 1894, Christian May refused to accept the trust, and on the same day D. H. Beurhaus and William Humphrey were appointed by the county court as such trustees, in place of Skinner and May, and they, with *Oscar A. Cole* so appointed, duly qualified as such trustees. July 25, 1900, Humphrey died, and September 11, 1900, Edward F. Wieman was appointed in his place, and he duly qualified. September 28, 1901, D. H. Beurhaus and Edward F. Wieman each filed his resignation in writing, and thereupon the county court made an order fixing November 5, 1901, as the time for making the appointment of two trustees in their places, respectively, and gave notice thereof accordingly. October 28, 1901, the city nominated William D. Sproesser and Charles R. Blumenfeld to be appointed as such trustees; and November 5, 1901, *Oscar A. Cole* appeared by his attorney, and nominated John Habhegger and William C. Raue to be appointed as such trustees in place of Beurhaus and Wieman, who had so resigned, and *Oscar A. Cole* then and there expressly objected to the appointment of Charles R. Blumenfeld as such trustee. The county court took the matter under advisement, and on November 16, 1901, entered an order accepting such resignations, and appointing John Habhegger and Charles R. Blumenfeld as such trustees upon filing a bond of $10,000, to be approved by the county court, and they within ten days thereafter gave the bond and qualified pursuant to the order.

It was further found by the circuit court that *Oscar A. Cole* and the city never consulted nor attempted to consult with each other in regard to the appointment of persons to fill such vacancies; that when the matter of such resignations came up to be heard in the county court an attorney appeared for and in behalf of *Oscar A. Cole,* and no one appeared in behalf of the city; that at the time of the appointment of Blumenfeld he was and still is a fit and proper person to be appointed as one of such trustees; that his character for in-

tegrity and business capacity was above reproach, and that he was in all respects fully qualified to act as such; that there was no ill-feeling on the part of Blumenfeld against *Oscar A. Cole,* and that there was no ground for ill-feeling on the part of *Oscar A. Cole* against Blumenfeld; that Blumenfeld had done nothing to indicate that he would not act in harmony with the other two trustees, and that there was no ground for believing that he would not.

As conclusions of law, the circuit court found that the order of the county court appointing Charles R. Blumenfeld as one of the trustees of said estate was regularly and correctly made in the exercise of the discretionary power of the county court, and that there was no abuse of such discretion in making the order from which *Oscar A. Cole* had appealed to the circuit court, and that Blumenfeld was lawfully appointed such trustee, and had duly qualified as such, and was entitled to be heard in a direct proceeding before he could be lawfully removed, and ordered judgment affirming the order of the county court. From the judgment entered accordingly, *Oscar A. Cole* appeals.

For the appellant there was a brief by *Olin & Butler,* and oral argument by *J. M. Olin.* They contended, *inter alia,* that courts of equity will remove trustees on the ground that there is hostility between them and co-trustees, or between them and the *cestui que trust.* 2 Story, Eq. Jur. sec. 1288; *Disbrow v. Disbrow,* 61 N. Y. Supp. 614; *May v. May,* 167 U. S. 310; *Quackenboss v. Southwick,* 41 N. Y. 117; *Scott v. Rand,* 118 Mass. 215; *Wilson v. Wilson,* 145 Mass. 490; *Estate of Syfert,* 9 Phila. 320; *In re Hilles,* 9 Weekly Notes Cas. 421. Much more will courts of equity decline in the first instance to appoint such a person as a trustee. *In re Tempest,* L. R. 1 Ch. App. 485. The appointment of Blumenfeld as trustee was not a case for the exercise of judicial discretion, but a case calling for the exercise of legal judg-

ment. *In re Tempest,* L. R. 1 Ch. App. 490; sec. 4027, Stats. 1898; *Appeal of Wilcox,* 54 Conn. 320, 8 Atl. 136. It was the duty of the county court in this case to appoint, if possible, two persons as trustees who were approved by the parties interested in the Cole estate. The testator's intention in this matter should have been respected by the court. *Mulberger v. Beurhaus,* 102 Wis. 1, 10; 1 Perry, Trusts, § 277.

For the respondent there were briefs by *Harlow Pease* and *Arthur Mulberger,* and oral argument by *Mr. Pease.*

CASSODAY, C. J. At the time of entering the order fixing a time for the determination of the matter of the resignations of Beurhaus and Wieman and the appointment of their successors, the county judge very properly notified the city and *Oscar A. Cole* in writing of the provision of the will requiring the appointment of two trustees to fill such vacancies, "subject to the approval of the interested parties," and that they were such interested parties, and therein suggested to each of them that they should "agree upon two reliable men to act as trustees" in case such resignations should be accepted, and to propose to the court for such appointment the names of the two persons so agreed upon. No such agreement was ever made, or attempted to be made, and the court finds that the two interested parties never consulted nor attempted to consult in regard to such appointment. Instead of doing so, each party, without consulting the other, proposed the names of two persons, regardless of the likes or dislikes of the other party. The county court appointed one of the two persons so proposed by each party. Habhegger, one of the persons so proposed by *Oscar A. Cole,* was appointed without any objection. The propriety of his appointment, therefore, is not before us for consideration. On the other hand, *Oscar A. Cole,* at the time of the hearing, expressly ob-

jected to the appointment of Blumenfeld, who had thus been proposed by the city. The question for determination is whether the county court was justified in appointing Blumenfeld against such objection and protest.

There is no claim that Blumenfeld is not a man of integrity and character and business capacity, and in all respects qualified to perform the duties of such trustee, but for certain reasons he is said to be objectionable to *Oscar A. Cole.* The court finds that Blumenfeld has no ill-feeling against *Cole,* and that *Cole* has "no ground for ill-feeling" against Blumenfeld. But that is not decisive of the question. Both courts seem to have acted upon the theory that, if each of the parties had the naming of one of the two persons so appointed, then neither could rightfully object to the person named by the other party, provided he was as well qualified as Blumenfeld was found to be. But such is not the purpose of the law. That purpose is not only to secure competent men of integrity, but also those who will co-operate in a friendly and harmonious manner in the transaction of business which may continue for several years. It is not to secure vigilant representatives of the respective parties interested, but those who will work together for the benefit, not merely of one of such parties, but for the whole estate. This is abundantly shown by authorities cited in the brief of counsel for the appellant. In one of them it was held in England many years ago that:

"The discretion which the court exercises in appointing new trustees is not a mere arbitrary discretion, but is to be exercised in accordance with certain principles. Among them are the following: . . . Secondly. The court will not appoint a person with a view to the interest of some of the *cestuis que trustent* in opposition to the interest of others. Thirdly. The court will have regard to the question whether the appointment will promote or impede the execution of the trust." *In re Tempest,* L. R. 1 Ch. App. Cas. 485, decided in 1866.

In that case it was said by Lord Justice TURNER in behalf of the court:

"I think so for this reason: That it is of the essence of the duty of every trustee to hold an even hand between the parties interested under the trust. Every trustee is in duty bound to look to the interests of all, and not of any particular member or class of members of his *cestuis que trustent.*" Id. 488.

In speaking of that decision it was said in a later case by that learned Master of the Rolls, Sir George JESSEL:

"I find also that although as a rule the court of chancery exercises its discretion in the appointment of new trustees—a discretion, I may say, as regards which I respectfully wish to express my cordial assent to what fell from Lord Justice TURNER in the case of *In re Tempest*—yet it is not an arbitrary discretion, but to be applied according to settled rules." *Forster v. Abraham,* L. R. 17 Eq. Cas. 351, 355–6.

The testator seems to have had in mind the harmonious co-operation of the executors and trustees; and so the will provides, in effect, that, in case any of the persons therein nominated and appointed as executors and trustees should die or refuse to accept the trust, then the county court was thereby authorized and requested to fill the vacancy by appointment, "subject to the approval of the parties interested in" the estate. In the case of *In re Tempest,* cited above, one of the trustees died during the life of the testator. By the terms of the will the right to appoint a new trustee was vested in the persons entitled to the surplus rents and profits. They could not agree in the choice of a trustee. On petition the Master of the Rolls appointed one Mr. Petre against the objection of one of the beneficiaries, not from any personal objection, but because he was connected with and proposed by a branch of the family with which the testator was not on friendly terms, and which he had excluded from the management of his property. On appeal the court reversed and set aside such appointment of Petre, and held, in addition to what has been stated, that "in selecting a person for the office (of trustee)

the court will have regard to the wishes of the author of the trust, expressed in, or plainly deduced from, the instrument creating it." L. R. 1 Ch. App. Cas. 484. The learned Lord Justice on that point said: "I think this rule may be safely laid down, because if the author of the trust has in terms declared that a particular person, *or a person filling a particular character,* should not be a trustee of the instrument, there cannot, as I apprehend, be the least doubt that the court would not appoint to the office a person whose appointment was so prohibited, and I do not think that upon a question of this description any distinction can be drawn between express declarations and *demonstrated intention.*" Id. 487.

True, as urged by counsel for the city, the language of the will authorizing and requesting the county court to appoint persons to fill vacancies, if strictly construed, would be limited to the filling of vacancies caused by the death or refusal to accept the trust by one or more of the persons nominated in the will. But, as indicated in the quotation last made, upon questions of this description there is no substantial distinction between the "demonstrated intention" of the testator and an "express declaration" of such intention. In either case the appointment to be made is to be "subject to the approval of the parties interested in" the estate. We are constrained to hold that effect should be given to such intention of the testator fairly deducible from the language of the will. Such ascertainable intention must be enforced. *In re Sharland, Kemp v. Rozey,* L. R. 1896, 1 Ch. 517; *Adams v. Cowen,* 177 U. S. 475, 20 Sup. Ct. 668. Of course, neither of the parties can dictate such appointment, nor contumaciously refuse to agree upon the person to be appointed. The county court has a certain discretion to be exercised in accordance with the principles mentioned, but not arbitrarily and contrary to the expressed wish of the testator.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to reverse

that part of the order and judgment of the county court which appointed Charles R. Blumenfeld as one of such trustees, and to remand the case to the county court for further proceedings in accordance with this opinion.

RICHARDSON, Respondent, vs. BABCOCK, Appellant.

September 8—September 29, 1903.

Instructions to jury: Exceptions: Credibility of witnesses: Evidence: Burden of proof: Conversation between parties.

1. A general exception to the whole of a certain part of the charge to the jury is unavailing if any distinct and independent proposition covered by such exception is correct.
2. The jury may properly be instructed that if they believe that a witness has wilfully and knowingly sworn falsely as to any material matter in issue they are at liberty to disregard his entire testimony, except so far as corroborated by other credible evidence.
3. If an instruction to the jury is so worded that it may reasonably receive two different interpretations, one correct and one incorrect, it must be held erroneous and prejudicial.
4. An instruction to the effect that the jury are not bound to believe everything a witness testifies to, provided they believe that he is mistaken or has wilfully falsified as to one matter, is criticised.
5. In a colloquy between court and counsel at the close of the charge, the court assented to the proposition that plaintiff must recover, if at all, upon the preponderance of evidence, and further instructed the jury that the burden of proof was upon plaintiff to establish the contract sued on as he claimed it to be, by the weight of the testimony. *Held*, not erroneous. in the absence of a request for more specific instructions.
6. Where an entire conversation between parties related to the subject matter of the controversy, though a part thereof was somewhat remote in its bearing, it was all properly admitted in evidence.

APPEAL from a judgment of the circuit court for Green county: B. F. DUNWIDDIE, Circuit Judge. *Affirmed.*

This is an action by a broker to recover commissions for the sale of land. The plaintiff claims that he procured purchasers for sixteen quarter sections of land in South Dakota under a contract with the defendant by which he was to be paid $50 per quarter section for his services, and that the defendant has paid only $211 thereon, leaving a balance of $589 due. The defendant admits that he agreed to pay the plaintiff $50 per quarter section for all lands sold by the plaintiff which belonged to him individually, and that the plaintiff sold three quarter sections of such land, and earned $150 in commissions thereby; but he claims that the balance of the lands sold by the plaintiff was the property of a corporation called the Artesian Land Company, and he denies that he agreed to pay the plaintiff anything for selling said last-named land. The defendant also claims to have paid $275.82 in excess of the commissions earned by the plaintiff, and counterclaims to recover that sum.

The action was tried before a jury, the principal question being as to the terms of the contract between the parties. In the course of his charge to the jury the trial judge gave the following instructions:

"Your verdict, of course, will be based upon the evidence, and the evidence alone. You must carefully, impartially, and fairly weigh it, and all of it, to the best of your ability, and render such verdict as you find and believe from the evidence should be rendered. In weighing the testimony of the witnesses, you are not bound to believe everything testified to by a witness to be a fact, because the witness so testifies, provided you believe from the evidence in the case, and from all the facts and circumstances proven on the trial, that such witness is mistaken as to some matter testified to, or has knowingly and wilfully testified falsely in relation thereto. And if you find and believe from the evidence that any witness has wilfully and knowingly sworn falsely on this trial as to any matter or thing material to the issues in this case, then you are at liberty to disregard the entire testimony of such witness, except in so far as such testimony has been corrob-

orated by other credible evidence in the case, or by facts and circumstances proven on the trial."

At the close of the general charge the following colloquy between the court and counsel took place:

"*Court:* Did you notice any misstatements in the charge, gentlemen? *Mr. Clawson:* If the plaintiff recovers, he must recover on a preponderance of the evidence. *Court:* Yes; (to jury) the burden of proof is upon the plaintiff to establish the contract as he claims it to be. *Mr. Douglas:* That is, from the weight of the testimony. *Court:* Yes; the weight of the testimony, not the number of witnesses."

The jury returned a verdict for the plaintiff, with damages assessed at $391.64, and the defendant appeals from judgment thereon.

For the appellant there was a brief by *P. J. Clawson* and *L. Q. Hardesty,* and oral argument by *Mr. Clawson.*

For the respondent there was a brief by *H. N. B. Caradine* and *A. S. Douglas,* and oral argument by *Mr. Douglas.*

WINSLOW, J. The appellant's principal contention is that that part of the charge of the court relating to the credibility of witnesses, which is quoted in full in the statement of the case, is erroneous. Separate exceptions were not taken to the various sentences of this part of the charge, but one general exception was taken to the whole thereof. In this situation, the rule is familiar that, if any distinct and independent proposition covered by the exception is correct, the exception is unavailing.

The last proposition contained in that part of the charge quoted, to the effect that, if the jury believe that any witness has wilfully and knowingly sworn falsely as to any material matter in issue, then they are at liberty to disregard his entire testimony, except so far as corroborated by other credible evidence, is undoubtedly a correct statement of the law. The cases so holding are numerous, beginning with *Mercer v. Wright,* 3 Wis. 645, and ending with *Patnode v. Westen-*

haver, 114 Wis. 460, 90 N. W. 467. Had a separate exception been preserved to the proposition immediately preceding the sentence just considered, the question whether it could be sustained would be a doubtful one. It must be said that it is unfortunate in its wording, if not positively erroneous, because liable to be wrongly interpreted. The principle is well settled in this court that if an instruction is so worded that it may reasonably receive two different interpretations, one correct and one incorrect, it must be held erroneous and prejudicial. *Small v. Champeny,* 102 Wis. 61, 78 N. W. 407, and cases cited at page 68 of 102 Wis. (78 N. W. 409). Stripped of verbiage, the sentence in question says that the jury are not bound to believe everything a witness testifies to, provided they believe that the witness is mistaken or has wilfully falsified as to one matter testified to. Now, if this can only be construed by a reasonable mind to mean simply that the jury may reject the testimony of the witness as to the one matter about which he is mistaken or has falsified, the instruction is correct; but if reasonable men upon the jury might understand from the sentence that, if they believed the witness was mistaken or has falsified as to one matter, then they were at liberty to reject his testimony as to other matters, it is evidently erroneous and misleading. Herein lies the only difficulty with the instruction. As no proper exception has been preserved, we do not decide the question, but we may properly indicate that, if the idea which was in the mind of the court is to be given to the jury, it should be given more clearly, and in language which will admit of no reasonable misconstruction.

Exception was also taken by the defendant to the remarks of the court made during the colloquy between court and counsel at the close of the charge relating to preponderance of evidence and burden of proof. The remarks were strictly correct. Assent was given to the proposition that the plaintiff must recover, if at all, upon the preponderance of evi-

dence, and the further instruction was given that the burden of proof was upon the plaintiff to establish the contract as he claimed it to be by the weight of the testimony. There was no request for any more specific instructions, and hence no error.

An exception was urged to one ruling upon testimony, which must be briefly considered. The plaintiff claimed to have induced one Smock to go to South Dakota to examine the lands, and that Smock had purchased a number of quarter sections as the result of the visit. The defendant denied that plaintiff had sold any lands to Smock. In order to prove his contention that there had been a sale to Smock, the plaintiff testified to a conversation with the defendant in which the defendant admitted that Smock bought a quarter section, but also said that he (defendant) was obliged to buy a quarter section with him to get him to buy, and that Smock paid $1,200 for his quarter section, but that defendant paid only $300 for his, whereupon the plaintiff objected to this way of treating customers. The latter part of the conversation was objected to by the defendant as irrelevant, but the objection was overruled. We find no error in this ruling. The entire conversation related more or less directly to one of the contested questions in the case. While the part objected to was somewhat remote in its bearing, still it was held between the parties, and related to the general subject matter of the controversy, and hence was properly allowed.

Finally it was objected that the verdict was against the evidence. We have examined the evidence with care, and find it to be sufficient.

By the Court.—Judgment affirmed.

FISHER and another, Appellants, vs. WESTERN UNION TELEGRAPH COMPANY, Respondent.

September 8—September 29, 1903.

Telegraph companies: Delay in delivering message: Damages: Proximate result: Action, tort or contract.

1. Under sec. 1778, Stats. 1898 (making telegraph companies "liable for all damages occasioned by the failure or negligence" of their employees in receiving, copying, transmitting, or delivering messages), the damages recoverable are such only as are the proximate result of the company's breach of duty.
2. Damages so proximately resulting from breach of the company's duty in the cases mentioned in the statute are recoverable, even though the action is upon contract, without showing that the company was chargeable with knowledge that such results were likely to follow from its conduct.
[3. Whether the addressee of a telegram, the sender not being his agent nor making a contract for his benefit, must sue, if at all, for breach of duty constituting actionable negligence, not determined.]
4. Negligent delay in delivering a telegram which merely rejected plaintiffs' offer to buy goods on certain terms did not entitle them to recover damages on account of their failure to make the purchase on other terms, as they might or would have done had the telegram been seasonably delivered. Such damages are not the proximate result of the company's breach of duty.

APPEAL from a judgment of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Affirmed.*

Action to recover damages alleged to have been sustained by breach of duty on the part of defendant in failing to deliver a telegram with reasonable diligence. The complaint was to this effect:

Plaintiffs, who were dealers in tobacco at Janesville, Rock county, Wisconsin, on May 24, 1901, delivered to defendant, a corporation engaged in the telegraph business and having a line for communication between Janesville, Wisconsin, and Westby, Wisconsin, for transmission to A. Johnson, a

person having a stock of tobacco for sale at the latter place, a dispatch worded as follows: "Your letter received. Offer accepted. You to pay for sampling by Linde Hamilton. Answer." The dispatch was delivered to Johnson at 2 o'clock p. m. on the day aforesaid. At 7:15 p. m. thereafter, Johnson delivered to defendant at Westby, for transmission to plaintiffs at Janesville, a reply worded as follows: "Will not pay for sampling." It was received at defendant's office in Janesville at 7:40 p. m. after such delivery at Westby. The agent at Janesville who received the same knew at the time thereof that plaintiffs expected a reply from Johnson to the offer for his tobacco and were anxious to be in possession thereof as soon as practicable. Their place of business was but a short distance from the telegraph office in Janesville, and there was easy means of communication between such place of business and such office by telephone. Defendant neglected to deliver the dispatch there till 12:20 p. m. on the third day after it was received as aforesaid. Prior to the sending of the telegram to Johnson plaintiffs, as agents for Samuel L. Johns, of McSherrytown, Adams county, Pennsylvania, examined Mr. Johnson's stock of tobacco, which consisted of 923 cases weighing 282,365 pounds, and made an offer for the same, which was subsequently refused, the refusal being accompanied by an offer to sell the stock for ten cents per pound, marked weights, no pay for cases. When plaintiff's telegram was sent to Johnson and his reply was received at the Janesville office they had authority to accept the tobacco upon the terms mentioned in such reply, and would have done so in time to have secured the same had such reply been delivered to them with reasonable diligence. By the delay in that regard they lost the opportunity to buy the tobacco, and were thereby damaged in the sum of $923 in that by the contract with their principal they would have been entitled to a commission of that amount in case they obtained the tobacco. Plaintiffs filed their claim for damages with de-

fendant sixty days after Johnson's message to them was delivered to defendant's Westby office for transmission.

Defendant answered denying that its agent at Janesville knew when the Johnson message to plaintiffs was received that there was any special importance attached to it; also denied all allegations respecting plaintiffs having been damaged by delay in delivering the telegram, and admitted substantially all other allegations in the complaint.

A finding by the jury was waived. The court found facts as alleged and admitted, and further, in effect, that the telegram to Johnson related to negotiations between plaintiffs and the former for the purchase of tobacco as alleged; that at 9:50 a. m. after Johnson's reply was delivered at the Westby office he sold the tobacco to other parties, and that had plaintiffs obtained the tobacco they would have earned as commission the amount alleged in the complaint, to wit, $923. Evidence to the effect that had plaintiffs seasonably received the reply they would have immediately offered to take the tobacco and paid for the sampling, and that had Johnson received such an offer before he sold to other parties he would have accepted it, was rejected.

Upon the facts found the court concluded as matter of law that the damages claimed by the plaintiffs were too remote to be recovered, and judgment was rendered accordingly.

For the appellants there was a brief by *Fisher & Oestreich*, and oral argument by *A. M. Fisher*. To the point that the delay by the defendant company in the delivery of the message in question was the direct and proximate cause of plaintiffs' loss, they cited Joyce, Electric Law, §§ 945, 975; Sutherland, Damages (2d ed.) § 961; *Western U. Tel. Co. v. Wilhelm*, 48 Neb. 910, 67 N. W. 870; *Carver v. W. U. Tel. Co.* 15 Tex. Civ. App. 547, 39 S. W. 1021; *Western U. Tel. Co. v. Haman*, 2 Tex. Civ. App. 100, 20 S. W. 1133; *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; *Western U. Tel. Co. v. Lyman*, 3 Tex. Civ. App. 460, 22 S. W. 656; *Mitchell v. W.*

U. Tel. Co. 5 Tex. Civ. App. 527, 24 S. W. 550; *Western U. Tel. Co. v. Linn,* 87 Tex. 10, 23 S. W. 895; *Thompson v. W. U. Tel. Co.* 64 Wis. 531; *State Ins. Co. v. Jamison,* 79 Iowa, 245, 44 N. W. 371; *McPeek v. W. U. Tel. Co.* 107 Iowa, 356, 78 N. W. 63; *Parks v. Alta C. Tel. Co.* 13 Cal. 423; *Western U. Tel. Co. v. Cook,* 54 Neb. 109, 74 N. W. 395; *Wallingford v. W. U. Tel. Co.* 60 S. C. 210, 38 S. E. 443.

For the respondent there was a brief by *A. G. Zimmerman,* attorney, and *Rufus B. Smith,* of counsel, and oral argument by *Mr. Smith.*

MARSHALL, J. Upon what precise ground the trial court decided this case does not appear. Counsel for the respective parties may have agreed in the presentation of the cause there, as they did here, that the action was for breach of contract, and the decision have been rendered upon the authority of cases holding that the addressee of a telegram, the sender not being his agent nor making a contract for his benefit, must sue for breach of duty constituting actionable negligence or not at all. There is much authority to that effect. *Western U. Tel. Co. v. Dubois,* 128 Ill. 248, 21 N. E. 4; *McPeek v. W. U. Tel. Co.* 107 Iowa, 356, 78 N. W. 63; *Webbe v. W. U. Tel. Co.* 169 Ill. 610, 48 N. E. 670; *Curtin v. W. U. Tel. Co.* 13 App. Div. 253, 42 N. Y. Supp. 1109; 25 Am. & Eng. Ency. of Law, 826. Whether it voices the law correctly need not be decided. That will be an important and interesting question for discussion and decision in the event of a cause coming here depending upon its solution. The trial court may have decided the cause wholly upon the ground that the damages claimed were not the proximate result of respondent's breach of duty, since there was neither a contract consummated nor even an advance upon one side in the nature of an offer which by seasonable acceptance would have made a contract, but merely the late delivery of a message rejecting

an offer, which left the person sending the same free to treat as he might see fit any subsequent offer made to him.

The idea advanced on behalf of appellants is that, had they known Johnson's attitude in time, they would have submitted thereto and he would have sold them the tobacco, hence that their failure to obtain the property was occasioned by respondent's breach of duty within the meaning of our statute. It is argued that the legislature, in providing that, "Any person, association or corporation operating or owning any telegraph . . . line doing business in this state shall be liable for all damages occasioned by the failure or negligence of their operators, servants or employees in receiving, copying, transmitting or delivering of dispatches or messages" (sec. 1778, Stats. 1898), intended to render the element of proximate relation, in the common-law sense, of the damages to the injury complained of, in a case like this, unnecessary. We are unable to subscribe to that view. Such a radical change in the legal relation of parties as that would mean could not properly be read out of a legislative enactment without the language thereof being plain and unmistakable. There are many laws respecting liability for breach of duty on the part of persons and corporations performing *quasi*-public services, where language similar to that in question is used, the word "occasioned" or some similar word being in place as here, in respect to which it has been held that such word refers to "occasioned" in a legal sense only, not extending beyond the settled rules as to proximate relation of damages to the injury in the law of negligence, requisite to render the same recoverable. The statute requiring the fencing of railroads, as it existed when *Curry v. C. & N. W. R. Co.* 43 Wis. 665, was decided, made every railway corporation liable for breach of duty thereunder for all damages "occasioned thereby." Nevertheless it was held that the statute did not create a rule of absolute liability; that the word "occasioned" was used with reference to settled rules of legal responsibility

for breach of duty constituting actionable negligence. It was decided that the defense of contributory negligence was not taken away by the statute. Subsequently, to accomplish that result a radical change was made in the statute, leaving the legislative will in respect to the matter unmistakable. By sec. 1339, Stats. 1898, towns are made liable for all damages to any person or his property while he is traveling on the highway, caused by reason of any want of sufficiency thereof, yet the doctrine of proximate cause is held to apply to an action to recover under such statute the same as any other action grounded on negligence (*Seaver v. Union,* 113 Wis. 322, 89 N. W. 163), and the settled rule limiting recoverable damages to the proximate results of the wrong complained of has always applied. *McNamara v. Clintonville,* 62 Wis. 207, 22 N. W. 472; *Oliver v. La Valle,* 36 Wis. 592; *Stewart v. Ripon,* 38 Wis. 584.

In view of the foregoing it seems quite clear that, under the statute, damages are recoverable—even where the action is for breach of contract, and will lie in that form only,—not within the contemplation of the parties, when their relations were formed, as the probable result of a breach thereof; that is, that the familiar doctrine of *Hadley v. Baxendale,* 9 Exch. 341, often approved by this court (*Cockburn v. Ashland L. Co.* 54 Wis. 619, 12 N. W. 49; *Guetzkow Brothers Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119), and controlling ordinarily in actions for damages for breach of contract, does not apply regardless of the form of the action; that it has been displaced by the statute. In that light, *Hibbard v. W. U. Tel. Co.* 33 Wis. 558, *Candee v. W. U. Tel. Co.* 34 Wis. 471, and similar cases, do not apply.

The full scope of the statute has not been defined by any previous decision of this court. The subject was touched upon in *Cutts v. W. U. Tel. Co.* 71 Wis. 46, 36 N. W. 627. It was there inferentially held, at least, that a telegraph company is liable in case of breach of duty in respect to deliver-

ing a telegram for all damages flowing, in a legal sense, from such breach, though the circumstances rendering the same a probable result of such breach were unknown to the company. *Hartstein v. W. U. Tel. Co.* 89 Wis. 531, 62 N. W. 412, and *Summerfield v. W. U. Tel. Co.* 87 Wis. 1, 57 N. W. 973, are consistent therewith. In the latter case the court, speaking by Mr. Justice WINSLOW, said:

"We cannot regard the statute as creating, or intended to create, in any way, new elements of damage. . . . Had a radical change in the law relating to the kinds of suffering which should furnish a ground for damages been contemplated, the act would have expressed that intention in some unmistakable way. We see nothing in the law to indicate such intention."

The point involved there was whether loss attributable to injured feelings, only, was recoverable. The decision was based upon the doctrine that all injuries causing measurable damages having some proximate relation to the injury can be recovered; that in the absence of any physical injury, by common law rules, there is no such proximate relation and that the legislature did not intend by the statute to displace that doctrine. We see no reason for departing from that view. Where there is a proximate relation in a common law sense between an injury caused by a failure of duty on the part of a telegraph company in the cases mentioned in the statute, and the injurious results, if there be such, the party damaged is entitled to recover compensation for such results under the statute, whether the form of action be on contract or for breach of duty constituting actionable negligence.

The learned counsel for respondent in the course of their argument fell into some confusion by mixing, so to speak, the rule of *Hadley v. Baxendale* with the doctrine of proximate cause in the law of negligence, and such doctrine with that of proximate relation between an injury and the results in a negligence action necessary to render the same subjects for compensation. The one is quite different from

the other. In the former, the wrongdoer must be so circumstanced at the time of the breach of duty as to be chargeable with knowledge that an injury to the person or property of another may probably result from such breach. That element is essential in addition to that of natural and probable consequences of the conduct of the wrongdoer as regards the particular injury, the conduct and consequences being connected, directly or by an unbroken chain of successive events dependent each upon the other. An actionable injury having taken place, the results forming legitimate subjects for compensatory damages are not dependent upon any presumed knowledge or reasonable apprehension on the part of the wrongdoer of the probability of such or any particular results. It is only necessary, as to any particular result, that it shall have been a natural consequence of the injury, having regard to the usual course of nature and of cause and effect in a line of unbroken physical causation. That satisfies fully the essential of proximate relation between damages and injury, though it does not appear that the wrongdoer had any reasonable ground whatever to assume that such results were likely to follow from his conduct. 1 Sutherland, Damages, § 16; *Brown v. C., M. & St. P. R. Co.* 54 Wis. 342, 354, 11 N. W. 356, 911; *McPeek v. W. U. Tel. Co.* 107 Iowa, 356, 78 N. W. 63. It will be seen that, in studying this subject and applying decided cases, to avoid danger of going astray one must distinguish somewhat between the term "result" as applied to the injury and results as applied to the proximate consequences of the injury.

Applying the foregoing to the facts of this case, can it be said that the failure of appellants to purchase Johnson's tobacco was directly caused by respondent's failure to seasonably deliver to appellants Johnson's telegram and that such event came about as a natural, ordinary result of respondent's conduct, by ordinary, natural, unbroken causation? It seems that such proposition must be resolved in favor of re-

spondent. Otherwise we would be led to hold that it would have been in the natural order of things for appellants, had they received Johnson's telegram seasonably after 7:40 p. m. on the day after it arrived at respondent's Janesville office, to have re-opened negotiations with Johnson by making him a new offer eliminating the element which caused the rejection of their first offer, to have done so in time to reach Johnson before he sold the tobacco to other parties, and for him to have accepted the new offer though he was under no obligation, morally or otherwise, to do so, his telegram being neither in the nature of an offer to appellants nor an invitation to them to continue negotiations. That would be carrying the limits of consequential damages in a legal sense beyond reason and authority. It was within possibilities for events to follow one another in that order to the result suggested, but something more is necessary than mere possibility to constitute the proximate connection between a wrongful injury and the ultimate results rendering it a subject for compensatory damages.

The authorities cited by appellants' counsel come far short of supporting the contention that the damages sought to be recovered here are the proximate result of respondent's negligence. In *Thompson v. W. U. Tel. Co.* 64 Wis. 531, 25 N. W. 789, there was a sale of property subject to delivery thereof in time to enable the purchaser to load the same for shipment by rail. By negligence of the telegraph company in transmitting and delivering a message the property did not reach the prospective purchaser in time for him to consummate the trade. The difference between such a situation and the one before us is so obvious that we need not stop to point it out. In *Western U. Tel. Co. v. Wilhelm,* 48 Neb. 910, 67 N. W. 870, the terms of an exchange of property were agreed upon, but by breach of duty on the part of the telegraph company in transmitting a dispatch calling for the presence of one of the interested parties with an abstract, the agreement

was not consummated. In *McPeek v. W. U. Tel. Co.* 107 Iowa, 356, 78 N. W. 63, we have quite an extreme case. There the court ruled that whether the loss was a proximate result of the breach of duty complained of was a question of fact, and, it having been solved in the trial court on evidence, the solution would not be disturbed on appeal. There, as here, the suit was by the addressee of the telegram. It was said that his right to recover was not based upon breach of contract, but on breach of duty constituting actionable negligence; that the damages in such a case, unlike in one for breach of contract, are not limited to such as might reasonably have been within the contemplation of the parties, but extended to all injurious results flowing from such act by natural sequence, without the interposition of any other negligent act or overpowering force. The plaintiff had laid a plan for the arrest of a fugitive from justice, which would enable him to earn a reward offered for the capture. He arranged for information to be sent him by telegraph of the occurrence of expected events placing the fugitive within his reach. A dispatch giving such information was delivered to the telegraph company, but by delay in its transmission to plaintiff he was unable to consummate his plan of capture. The sending of the dispatch was the final move to enable the plaintiff to proceed to lay his hands upon the fugitive. In such circumstances it was quite clear that it was at least a question of fact as to whether failure to make the capture was not the proximate result of the telegraph company's breach of duty in delaying the transmission of the dispatch.

Here the delayed dispatch was an adverse termination of a negotiation by which plaintiffs sought to obtain Johnson's tobacco. There was no suggestion in it for a continuance of negotiations. Nothing was to be effected by the delayed dispatch beneficial to appellants. It can easily be seen that the case of appellants is not within the principle of any of the cases cited. A review of the rest of the authorities relied on

would not improve the situation in that regard. In each of the cases specially referred to the breach of duty was in respect to an essential step in an affair the success of which depended upon it. In the one before us the breach of duty was in respect to a closing event in a transaction not calling for or suggesting any further action on the part of either party thereto. Obviously, even if it be true that appellants would have renewed negotiations with Johnson and carried the same on to effect, had they been seasonably informed of the failure of their first effort, it cannot be said that such a course or result would have been in that natural order of things requisite to the proximate relation of damages to breach of duty which is necessary to legal liability therefor.

By the Court.—The judgment is affirmed.

MORTON, Appellant, vs. SMILEY and another, Respondents.

September 8—September 29, 1903.

Contracts: Breach: Court and jury: Trusts.

The complaint alleged that plaintiff executed and placed in the custody of one of the defendants a deed conveying his undivided interest in certain land, upon their promise to obtain from the grantee for him a certain sum to be applied upon judgments against him; that defendants failed to obtain such money; and that, through insolvency of the grantee and a conveyance of the land to an innocent purchaser, plaintiff has lost his interest in the land, to his damage in the sum mentioned. Plaintiff testified to the making of such promise, and the other facts were undisputed. *Held*, that it was error to direct a verdict in favor of defendants on the ground that the evidence failed "to show any trust reposed in the defendants."

APPEAL from a judgment of the circuit court for Green county: E. B. BELDEN, Judge. *Reversed.*

This action was upon a complaint alleging that the plaint-

iff, being owner of an undivided one-eighth of certain real estate in Green county, consented to a sale of the entire property at $900; but his one-eighth being incumbered by judgments largely exceeding his share of the purchase price, which he could not presently satisfy, he executed, with the other owners, a warranty deed, which was placed in the custody of the defendant *Sherron,* upon an agreement by both defendants that they would see that plaintiff received, either directly in money, or by application upon the judgments against him, his proportionate share of the purchase price, to wit, $112.50; that the defendant *Sherron,* in breach of such agreement, delivered such deed to the grantee, Broderick, without any payment by him on account of plaintiff's share; that before plaintiff learned of such delivery, Broderick had become insolvent, and had conveyed the premises to an innocent purchaser; that plaintiff meanwhile had been compelled to pay and satisfy all of the judgments against him—whereby he prayed to recover of both defendants the agreed sum, $112.50. The defense was substantially a denial of any agreement on the part of either defendant. At the close of the trial, the court directed a verdict in favor of the defendants, whereon judgment was entered, from which the plaintiff appeals.

For the appellant there was a brief by *H. N. B. Caradine* and *F. W. Hall,* and oral argument by *S. T. Swanson.*

For the respondents there was a brief by *Colin W. Wright* and *A. S. Douglas,* and oral argument by *Mr. Wright.*

Dodge, J. It is quite apparent, both from the bill of exceptions and from the argument in this court, that this case was so complicated upon the trial as to obscure the very simple ground of action set forth in the complaint, and supported by at least some evidence. That ground of recovery was neither tort, breach of trust, nor money had and received, but was simply that the two defendants promised to

obtain for plaintiff from Broderick $112.50, to be applied on the judgments against plaintiff, if he would execute and deliver to *Sherron* a warranty deed of his share in the land. Plaintiff testified unambiguously to the making of such promise. The performance of the consideration by him and the failure to obtain the money by the defendants was undisputed, as was also the resulting damage to him. If the jury believed his testimony that such promise was made, plaintiff was entitled to recover. If there is any credible evidence to support a contention of fact, a question arises which must be submitted to the jury, although the trial court may be convinced that the preponderance of the evidence is to the contrary. *Lewis v. Prien,* 98 Wis. 87, 73 N. W. 654; *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 141, 88 N. W. 57. Here, as already stated, there was the testimony of the plaintiff that the defendants did promise, as alleged in the complaint, corroborated by the extreme improbability that he would make a warranty deed of his interest without some understanding that he should be paid therefor. Hence it was error to withhold that question from the jury. The reason given by the trial court, namely, that the evidence failed "to show any trust reposed in the defendants," was not responsive to the situation. The evidence at least tended to prove a promise by the defendants; thus rendering immaterial the reposing of any trust in them otherwise.

By the Court.—Judgment reversed, and cause remanded for a new trial.

McCarthy, Appellant, vs. Murphy and another, Respondents.

September 9—September 29, 1903.

Waters: Riparian owners: Exclusive right to build piers: Private nuisance: Abatement: Conversion.

1. A riparian owner on an inland navigable lake has the exclusive right to build piers and wharves in front of his land in aid of navigation, and may remove, as a private nuisance, a pier erected there by another person.
2. Where riparian owners on a lake, after carefully removing a pier built by another person in front of their land, placed the material on the shore, and the builder of the pier afterwards took possession thereof, there was no actionable conversion of such material by said riparian owners.

Appeal from a judgment of the circuit court for Dodge county: James J. Dick, Circuit Judge. *Affirmed.*

An action to recover damages from respondents for removing a pier, which appellant had erected on the bed of Fox Lake, Dodge county. The respondents were lessees of a tract of land on Fox Lake, a navigable body of water. The land was owned by one Elias Kennedy, who leased it to respondents April 23, 1902, for one year, with the privilege of extension at the option of the lessees. Appellant's pier was erected in front of the premises included in the lease. The pier was connected with the shore by a loose plank or planks, for landing on the premises of respondents. Appellant was engaged in carrying passengers by boat, receiving and leaving them on this pier. He had no right or title to the bank on the shore of the lake where the pier was located. Respondents and their lessor, Elias Kennedy, caused a written notice to be served on appellant July 31, 1902, requiring him to remove the pier. This appellant refused and omitted to do. Thereafter respondents removed the pier, placing the mate-

rial on the shore. Subsequently appellant took possession of it. The pier was constructed and located wholly within and upon the bed of the lake and shore of the premises occupied by respondents as lessees. They conducted a hotel and summer resort, and engaged in the business of conveying passengers by row, sail, and steam boats. They had constructed and owned a pier abutting on the bank for the use of guests and boat passengers. The court found that the plaintiff had no cause of action, and awarded judgment to respondents for costs and disbursements.

M. E. Burke, for the appellant, contended, *inter alia,* that the title of owners of land bounding upon an inland, natural, navigable lake, ends with the high-water mark, and all of the soil or the bottom of the lake below high-water mark is held by the state in trust for the people. *Pewaukee v. Savoy,* 103 Wis. 271; *Mendota Club v. Anderson,* 101 Wis. 479–492; *Ne-pee-nauk Club v. Wilson,* 96 Wis. 290; *Delaplaine v. C. & N. W. R. Co.* 42 Wis. 214; *Boorman v. Sunnuchs,* 42 Wis. 233; *Diedrich v. N. W. U. R. Co.* 42 Wis. 248. The soil of the lake between low and high-water mark, even when uncovered by water, continues in the possession of the state, the same as that portion of the bottom of the lake which is never uncovered by water. *Diedrich v. N. W. U. R. Co.* 42 Wis. 248; *Illinois S. Co. v. Bilot,* 109 Wis. 418. This was an action for the conversion of personal property owned and possessed by plaintiff, which had been placed in the navigable waters of Fox lake in the form of a pier. *Larson v. Furlong,* 50 Wis. 681, 686. The defendants had no right to remove or destroy the plaintiff's pier unless it occasioned them some special damage or injury not common to the rest of the public. *Larson v. Furlong,* 50 Wis. 686, 687; *S. C.* 63 Wis. 325; *Walker v. Shepardson,* 2 Wis. 384; *S. C.* 4 Wis. 486; *Barnes v. Racine,* 4 Wis. 454; *Carpenter v. Mann,* 17 Wis. 155; *Cobb v. Smith,* 23 Wis. 261; *Greene v. Nunnemacher,* 36

Wis. 50; *Remington v. Foster,* 42 Wis. 608; Wood, Nuisances, §§ 618–676.

For the respondents there was a brief by *North & Lindley,* attorneys, and *M. L. Lueck,* of counsel, and oral argument by *Mr. Lueck.*

SIEBECKER, J. Many of the errors assigned pertain to questions of fact. Upon an examination of the evidence, we find there was conflicting evidence on material issues, and that the conclusions of the court were supported by evidence. It would serve no useful purpose to point out such evidence in the record; the conclusions of fact must stand.

The claim is made that respondents had no rights or privileges, extending beyond the high-water mark on the land occupied by them, different from and in addition to those of the public. This contention is without merit in the law of this state. It has been adjudged by this court as to the shore owner:

"As proprietor of the adjoining land, and as connected with it, he has the right of exclusive access to and from the waters of the lake at that particular place; he has the right to build piers and wharves in front of his land out to navigable waters, in aid of navigation, not interfering with the public use. These are private rights, incident to the ownership of the shore, which he possesses, distinct from the rest of the public. All the facilities which the location of his land with reference to the lake affords he has the right to enjoy for purposes of gain or pleasure; and they oftentimes give property thus situated its chief value. It is evident from the nature of the case that these rights of user and of exclusion are connected with the land itself, grow out of its location, and cannot be materially abridged or destroyed without inflicting an injury upon the owner, which the law should redress. It seems unnecessary to add the remark that these riparian rights are not common to the citizens at large, but exist as incidents to the right of the soil itself, adjacent to the water. . . . In such ownership they have their origin. They may

and do exist, though the fee in the bed of the river or lake be in the state." *Delaplaine v. C. & N. W. R. Co.* 42 Wis. 214; *Priewe v. Wis. State L. & I. Co.* 93 Wis. 534, 67 N. W. 918, and cases cited.

When such owner exercises these rights, he cannot invade the riparian rights of other bank owners. As to them, he has the same rights as the public. An intrusion of another's riparian rights is a legal wrong, which the law will redress. Nor can a stranger, by such intrusion on the bed of the water, acquire any vested rights or interests as against the riparian owners. Any structure erected by him, under such circumstances, is a private nuisance. The proprietor of such rights has the legal authority to protect them in a lawful and peaceable manner, to the extent of removing a structure, such as a pier, erected on the bank and bed of the waters in front of his lands. *Diedrich v. N. W. U. R. Co.* 42 Wis. 248; *Cohn v. Wausau B. Co.* 47 Wis. 322, 2 N. W. 546; *Yates v. Milwaukee,* 10 Wall. 497.

Appellant had acquired no right to maintain this pier at the point of its location by grant or license. It is assigned that the facts fail to support the conclusions of the trial court upon this issue. The evidence is conflicting whether Kennedy, the owner of the bank of the lake, at any time gave appellant a license to build the pier at the place located or not. The trial court found the fact against this contention, upon the disputed evidence, which sets the question at rest. When appellant erected and sought to maintain this pier, he did an injury to respondents, in the nature of a private nuisance, which they had a right to remove, to prevent injury from its continuance. Cooley, Torts (2d ed.) p. 48; *Larson v. Furlong,* 50 Wis. 681, 8 N. W. 1.

It is further contended that respondents, after removing the pier, appropriated the material to their own use. Nothing is disclosed to justify this charge. Upon the evidence adduced, the court found that respondents carefully removed

the pier, placed the material upon the shore of the lake, and that appellant took possession of such material. There is evidence to sustain this conclusion. We find no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

BLOOR and another, Executors, Respondents, vs. SMITH, imp., Appellant.

September 9—September 29, 1903.

Appeal: Mandate: Compliance by trial court: Performance of conditions: Laches.

Where a cause is remanded by the supreme court to the circuit court with direction to grant a motion of the appellant upon performance of the conditions indicated "within a reasonable time, to be fixed by the circuit court," the latter court cannot, without having fixed such reasonable time, refuse to grant said motion upon the ground that appellant has been guilty of laches in making it or in complying with the conditions imposed by the supreme court.

APPEAL from an order of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Reversed.*

The nature of the action and the relation of the parties sufficiently appear in the report of this case when here upon the former appeal. *Bloor v. Smith,* 112 Wis. 340, 354, 87 N. W. 870. The case was finally determined by this court December 17, 1901, and the mandate of this court was as follows:

"*By the Court.*—Both orders appealed from are reversed, and the cause is remanded with directions to deny plaintiffs' motion for confirmation of the sheriff's sale, and to grant motion of defendant *Emma Maud Smith* for vacation of the judgment as to her and leave to answer, upon performance of the conditions indicated within a reasonable time, to be fixed by the circuit court."

On January 9, 1902, the costs against the plaintiffs on such reversal were taxed at $171.25. After demand they were paid, with interest, February 22, 1902. On March 3, 1902, the defendant *Emma Maud Smith* paid the costs in this court, and thereupon the cause was remitted to the circuit court and filed therein, and notice thereof given to the plaintiffs March 8, 1902. Nothing further appears to have been done in the case until November 3, 1902, when *Emma Maud Smith* gave notice to the plaintiffs that upon the *remittitur,* files, records, and proceedings in the cause, and upon the judgment and mandate of this court, she would move the circuit court December 2, 1902, for the orders directed by the mandate of this court, above quoted. Such motion was finally heard by the circuit court February 10, 1903, and thereafter, and on April 14, 1903, the circuit court made the following order, denying such motion for the reasons therein recited, as follows:

"And it appearing to the satisfaction of the court that, in view of the circumstances, the said defendant *Emma Maud Smith* did not make or notice said motion within a reasonable time after the entry of said judgment of the supreme court, or after the payment of the costs of said motion and the filing of the *remittitur* in this court, and was guilty of gross and unreasonable laches and delay in electing whether or not she would accept the conditions imposed by the supreme court to the vacation of said judgment and denial of said motion to confirm, to the injury of the plaintiffs, which said laches and delay have been in no wise excused, on motion of Sawyer & Sawyer, attorneys for the plaintiffs, it is ordered that said motion be, and hereby is, in all things overruled and denied, and that the plaintiffs recover of the defendant *Emma Maud Smith* ten dollars, costs of this motion."

From that order the defendant *Emma Maud Smith* brings this appeal.

For the appellant there was a brief by *Bohmrich, Maher & Willrich,* attorneys, and *Sheridan & Wollaeger,* of counsel, and oral argument by *J. A. Sheridan.*

For the respondents there was a brief by *Sawyer & Sawyer,* and oral argument by *E. W. Sawyer.*

CASSODAY, C. J. Thus it appears from the recitals in the order that the trial court refused to execute the mandate of this court merely because the appellant did not sooner ask the court to do so, or because the appellant did not voluntarily comply with the conditions therein mentioned before the circuit court had fixed a reasonable time within which she must perform such conditions. True, she might have applied to that court to fix such time several months before the time she did. It is equally true that the plaintiffs might have applied to the circuit court to fix such time immediately after the *remittitur* was filed therein, or any time thereafter. So the court, in obedience of the mandate, might have fixed such time without any application from either party. The delay in making the application is no more the fault of the appellant than of the plaintiffs. The mandate only required the appellant to perform the conditions named "within a reasonable time, to be fixed by the circuit court." In other words, the circuit court was, by the mandate, required to fix such reasonable time before the appellant could be adjudged to be in default for failure to perform such conditions within the time to be so fixed. The conditions to be performed by the appellant in order to entitle her to relief were stated in the opinion of the court on the former appeal in these words: "The terms which should be imposed as condition of the relief to appellant should substantially reimburse plaintiffs the reasonable and necessary expenses incurred in entering the judgment which must be vacated." *Bloor v. Smith,* 112 Wis. 353, 87 N. W. 874. The items making up the amount are there given. The trial court had no alternative, therefore, but to execute the mandate of this court. This has, in effect, been held in numerous cases. *Patten P. Co. v. Green*

Bay & M. C. Co. 93 Wis. 283, 66 N. W. 601, 67 N. W. 432. In that case it was held that:

"Where this court, on reversing a judgment, remands the cause, 'with direction to enter judgment in accordance with the opinion,' and that opinion leaves nothing undetermined, the trial court should merely enter the judgment as directed, and should not allow any amendment to the pleadings or new litigation in the case."

See *Ean v. C., M. & St. P. R. Co.* 101 Wis. 169, 76 N. W. 329; *Baines v. Janesville,* 103 Wis. 103, 79 N. W. 29.

By the Court.—The order of the circuit court is reversed, and the cause is remanded with direction to execute the mandate of this court, as required on the former appeal, and for further proceedings according to law.

BUTLER, Respondent, vs. DAVIS, Appellant.

September 9—September 29, 1903.

(1) *Appeal: Immaterial error: Striking out evidence.* (2) *Agency: Husband and wife.* (3, 4) *Contracts: Drilling well: Implied guaranty: Time required.*

1. Striking out a statement volunteered by a witness on cross-examination is not a material error where the same statement made on the direct examination was not stricken out.
2. Where plaintiff's wife was his agent to collect moneys, but was not shown to have, or to have ever assumed, any broader authority, plaintiff was not bound by her statement, on receiving a partial payment for the digging of a well, that her husband would make the well all right.
3. In a contract to drill a well there is no implied undertaking that water shall be obtained, or that the well shall be a success as to quantity or quality of the water obtained, but only that the work shall be done in a workmanlike manner and with ordinary skill.
4. One who agreed to board a well-driller and helper while they were drilling a well for him cannot recover for any part of the

board furnished during such drilling, as being in excess of the agreement, if there was no contract as to the time the drilling would take and the work was not negligently prolonged.

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Affirmed.*

This is an action to recover for services and materials furnished in drilling a well. The plaintiff claimed in his complaint that on November 25, 1901, he contracted with the defendant to drill a well upon the defendant's farm at the price of $1 per foot for drilling and 65 cents per foot for casing, and that under this contract he drilled 242 feet, and put in the same amount of casing, on which contract $175 was paid February 11, 1902; that on April 14, 1902, the parties made another agreement, by which the plaintiff was to drill the well deeper at the same rates as under the former contract, and that the plaintiff thereupon drilled eighty-six feet further, and put in seventy-three feet of additional casing, no part of which has been paid for; that plaintiff also sold the defendant certain pump fittings amounting in all to $28.35 in value, no part of which has been paid.

The answer of the defendant admitted the making of the contract with the plaintiff in November, 1901, by which plaintiff was to drill a well on defendant's farm at the price of $1 per foot and the reasonable value of the casing and pump fittings furnished, and that by the terms of said contract the plaintiff agreed that he would obtain a sufficient supply of water for the defendant's household and stock and all farm purposes, and put in a pump and attach it to a windmill on the premises, and leave the well in proper condition to furnish such sufficient supply of water. The answer further alleged that the plaintiff represented to the defendant that he could get water sufficient for the defendant's needs at from twenty to thirty feet, and that he would complete the well in not more than eight or ten days. The answer admits

that it was a part of the agreement that the defendant would board the plaintiff and his helper and his team while the well was being dug. The answer further alleged that the plaintiff commenced work about November 12, 1901, and continued to drill until February 11, 1902, and put in a pump into the well, and attached it to the windmill, and informed the defendant that the well was complete, and that there was a sufficient supply of water, upon the faith of which statement the defendant paid the plaintiff $175, the plaintiff agreeing to make the well all right if it was not so; that as matter of fact the supply of water was wholly inadequate, and in a few days failed entirely, and plaintiff again came to the farm about April 14, 1902, and continued to drill until about May 29, 1902, when he again put in the pump and attached it to the windmill, and informed the defendant that there was a sufficient supply of water; that as matter of fact there was not a sufficient supply of water, and that said well has never been completed, and is of no value; that the work was done in a careless and unworkmanlike manner.

The answer also contained a counterclaim by which the defendant sought to recover of the plaintiff the value of the board furnished to the plaintiff and his man and team for seventeen weeks; also the value of services in hauling water from the river during such time, and the value of fuel used by plaintiff in running his engine, as well as the sum of $175 paid by the defendant to the plaintiff—amounting in all to the sum of $461. The plaintiff replied to the counterclaim, in substance denying its allegations.

The action was tried before a jury, and a verdict for the plaintiff was rendered, with damages at the sum of $388.70, upon which judgment was entered for the plaintiff, with costs, and the defendant appeals.

John A. Kelly, for the appellant.

D. W. Agnew, for the respondent.

WINSLOW, J. The main question at issue between the parties was whether the contract was simply to bore a well at a certain price per foot or whether the plaintiff, in addition, guaranteed to obtain a sufficient supply of water for the defendant's farm purposes. Upon this question most of the minor questions hinged. The evidence was in direct conflict upon the question, and it seems to have been fairly and fully submitted to the jury, who returned a verdict in favor of the plaintiff's version. While many exceptions were taken, there are only a few of them which are tangible or worthy of serious attention, and these will be briefly considered.

It appeared that the payment of $175 was made by the defendant to the plaintiff's wife, and that she was her husband's agent for that purpose. It did not appear, however, that she had any broader authority as agent of her husband, or had ever assumed to act as agent except to keep her husband's accounts and collect bills. One Ellen Davis, who was present at the time the money was paid, was called as a witness by the defendant, and upon cross-examination volunteered the statement that when plaintiff's wife received the money she said that her husband would make the well all right. This statement was stricken out by the court, and the ruling is assigned as error. There are two answers to the claim. In the first place, the witness had already testified to the fact in her direct examination, and the statement was never stricken out; in the second place, there is no evidence that the plaintiff's wife had any express or apparent authority to make any such agreement on behalf of her husband.

The court charged the jury that in a contract of well drilling there is no implied undertaking that water shall be obtained, or that the well shall be a success as to the quantity or quality of the water obtained, but only that the work shall be done in a workmanlike manner, with such skill as may ordinarily be expected from those who undertake such work.

It is contended that this instruction is erroneous, and that an agreement to obtain a sufficient supply of good water is implied in every contract to dig or bore a well. We are referred to no authority in support of this contention, nor have we found any. The uncertainty of obtaining a supply of good water, however skilfully the work is done, is matter of common knowledge. If well diggers were to be held to guarantee such results whenever they undertake to dig a well, we think there would be a great scarcity of diggers. We have no hesitation in approving the principle laid down by the trial court upon the subject.

The court took from the jury the consideration of all items in the counterclaim except the claim to recover the $175 paid on the contract, and this is claimed to be error. In support of this assignment of error it is said that there was evidence by the defendant to the effect that the plaintiff agreed that he would get water in eight or nine days; also that there was evidence that the well was negligently and unskilfully bored, and thus consumed several months in its construction, and hence that the defendant furnished board to the plaintiff and his helper and team for a long period, more than he was required to furnish by the contract, for which he is entitled to recover if the jury found either that the contract was as claimed by defendant or that the work was negligently prolonged. As to the first of these claims, it is sufficient to say that the defendant himself testified that the conversation between himself and the plaintiff was to the effect that the plaintiff thought it would take three or four weeks, but that he did not know the length of time it would take to get water. The evidence cannot be construed as showing that any definite contract as to time or depth was made by the plaintiff, even construing it most favorably to the defendant.

As to the second claim, there is absolutely no evidence that the boring of the well consumed any longer time by reason of careless or negligent work than it would have consumed if the

work had been faultless. It is true there was some evidence that the alleged failure to furnish a supply of good water was due to some defect in piping at the bottom of the well, but this failure, if such there was, did not tend to increase the time consumed, but rather to diminish it. All this evidence tending to show a failure to obtain a supply of good water on account of negligent work was properly submitted to the jury on the general question whether the plaintiff had fulfilled his contract, and under the circumstances of the case this was plainly its only legitimate function.

A number of instructions were requested by the defendant and refused, but, so far as they were correct, they were fully covered by the general charge. The general claim is made that the verdict is against the evidence, but examination of the record shows that this contention cannot be sustained.

By the Court.—Judgment affirmed.

SCHNEIDER, Appellant, vs. KNICKERBOCKER ICE COMPANY and others, Respondents.

September 9—September 29, 1903.

Railroads: Conveyance: Construction: Right of way as "located": Spur track to warehouse.

1. A conveyance to a railway company of a right of way "as now located, to the terminus of the road," on, over, and along certain land, may be construed as conveying no title beyond the point on said land to which the right of way had been legally located by surveying and staking out the center line thereof for the purpose of constructing and operating the road, as required by sec. 1846, Stats. 1898, even though, for the convenience of the grantor, the company had, before such conveyance, extended, or permitted the grantor to extend, a spur track beyond the terminus to which the right of way had been so legally located.

2. Where in such a case the grantee company afterwards removed a part of said extension of the spur track, as being upon a strip of land not acquired by it for right of way purposes, and its successor in title makes no claim to such strip, but acquiesces in the owner's claim that there is no right of way over it, the owner of a warehouse on an adjoining tract has no right under sec. 1802, Stats. 1898, to build or maintain a track over such strip to connect his warehouse with the spur track.

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Affirmed.*

Action to restrain defendants from removing a spur railway track, constructed by plaintiff, from certain lands where it was connected with the railway system of the defendant railway company to permit the moving of cars from such system to and from plaintiff's icehouse situated some distance from the terminal grounds of such railway company, and to establish his right to have such connection maintained, and to enjoy, by means thereof, the benefits of sec. 1802, Stats. 1898.

There is no bill of exceptions. The findings indicate the issues made by the pleadings and litigated. They are in substance and effect as follows: In and prior to December, 1899, the North Lakes Wisconsin Ice Company owned a tract of land in section 16, town 28, range 17 east, in Waukesha county, Wisconsin, bounded on the westerly side by the west line of such section. During the period mentioned the Milwaukee & Superior Railway Company, without having acquired a right of way over such land, surveyed, laid out, and established a center line therefor, traversing the same in an easterly and westerly direction, the westerly terminus being 100 feet east of the westerly boundary thereof, and occupied such right of way with its railway track, and subsequently extended such track, or permitted the same to be done by said ice company for the purpose of accommodating the latter in its business of dealing in ice, so that on December 1st, aforesaid, the westerly end of the track was about forty feet west

of said section line and on section 17. On said day said ice company conveyed to the railway company a right of way on said section 16, describing the same as one fifty feet wide as now located to the terminus of the road. August 14th thereafter plaintiff acquired an undivided half interest in a right of way fifty feet wide for a railway track in said section 17, connecting a place of business to be operated by him with the easterly boundary line of said section where defendant's railway track crossed the same. Subsequently the president and general manager of such railway company caused its track in said section and the westerly twenty feet thereof in section 16 to be removed, believing that portion to be upon lands not acquired by it for right of way purposes. A day or two thereafter said company conveyed its property, including whatever right it possessed to maintain a railway track upon its right of way in said section 16, to the defendant railway company. In September, 1901, plaintiff, at his own expense, constructed a spur track from the terminus of said track east of the line between sections 16 and 17, in a westerly direction to his icehouse in section 17, traversing the right of way in said section 17 of which he was part owner as aforesaid. He connected his track in section 16 with the defendant railway company's track. Immediately thereafter the defendant *Knickerbocker Ice Company* and the defendant *John Field* threatened to remove all that portion of plaintiff's track in section 16, and they intended so to do. To prevent such removal this action was commenced. The defendant railway company made no effort to disturb the situation created by plaintiff in any way. Plaintiff, at the time of the commencement of the action, was willing to comply with sec. 1802 aforesaid, and claimed the benefits thereof, and that he was the owner of a warehouse coming within its provisions, which he was entitled to reach from defendant railway company's track by a spur track connected therewith. Defendant *John Field,* at the time of the threatened removal as aforesaid,

owned the land in section 16 upon which the plaintiff constructed his track, subject to any rights the defendant railway company had therein. He denied that it possessed any such rights, and his position was acquiesced in by said company. Prior to the conveyance to said company its grantor, by the president and general manager thereof, promised plaintiff to extend its spur track to an icehouse to be erected by him in section 17, entitling him to enjoy the use of a railway connection between his icehouse and the railway system of such grantee, provided he conveyed the right of way for such track to said grantee and agreed to furnish it with a certain amount of freight; but no such conveyance or agreement was ever made; neither did the defendant railway company, at the time it purchased the property, have any notice of the existence of such promise. The terminus of said company's main line is about one mile from the point in dispute. It is reached by a spur track. Neither said company's yard nor terminal limits reaches to or includes the location of plaintiff's icehouse.

Upon such facts the conclusion was reached that the defendants were entitled to a judgment dismissing the plaintiff's complaint with costs.

J. E. Wildish, for the appellant.

For the respondents *Knickerbocker Ice Company, Wisconsin Lakes Ice & Cartage Company,* and *John Field,* there was a brief by *Ryan, Merton & Newbury,* and oral argument by *T. E. Ryan.*

C. H. Van Alstine, counsel, for the respondent *Chicago, Milwaukee & St. Paul Railway Company.*

MARSHALL, J. But one question discussed in the briefs of counsel need be considered in deciding this case. We see no way of escape from the decision of the trial court that the place where appellant insists upon maintaining his track and connecting it with that of the respondent railway company is

on premises owned neither by him nor such company, nor in which either owns a right of way. Appellant's counsel concedes, if that decision stands, that the judgment must be affirmed.

It is claimed that the railway company in fact owned a right of way up to the west line of section 16, including the premises in dispute, because it succeeded to the rights of the Milwaukee & Superior Railway Company after such company obtained a conveyance of a right of way for its railroad in said section 16, to the terminus thereof as the right of way was located, a track being then in place to and west of said section line, though the right of way was never surveyed to a point nearer such line than a point about 100 feet east of the same. It is well understood, we may safely say, that the location of a railway right of way, in a legal sense and in the sense the term is ordinarily used in railway parlance, is not accomplished by laying down a railway track, but by surveying and staking out the center line of the right of way for the purpose of building a railway track thereon and operating such track as required by sec. 1846, Stats. 1898. Respondent railway company's grantor never so established or located a right of way including the premises in question, so far as appears by anything in the record. From the circumstances that for the convenience of one of its customers it permitted such customer to extend, or itself extended, its track beyond the terminus fixed by the located right of way, and subsequently conveyed the road, so far as the right of way had been located, it does not necessarily follow that its grantee obtained title to the premises beyond the surveyed right of way. At the time the track east of the west line of section 16 and on the premises in dispute was removed there was certainly legitimate ground for the claim that no railway right of way had been located thereon, in a legal sense, or in the sense the term was used in the deed. In that view its president and general manager having seen fit to abandon the disputed

premises and done so, and its grantee, the respondent railway company, never having made any claim thereto, but submitted to the claim of *John Field,*—conceded to be the owner subject to such rights as such grantee may have therein—that it has no right of way over such premises, a third party circumstanced as plaintiff is cannot be heard successfully to claim to the contrary in order to enable him to enjoy a privilege dependent thereon. It seems quite clear that all parties interested in the title to the land in dispute prior to the claim of the appellant understood that the right of way conveyed to respondent railway company's grantor in section 16 did not extend to the west line of such section, and that with such view *John Field* was permitted to take and enjoy absolute possession of the premises as owner. Such parties having acquiesced in that construction of the conveyance, and it being a reasonable construction and one which was probably in the minds of the parties when the deed was made, the court cannot otherwise construe it to enable appellant to enjoy a privilege without which he will be a sufferer in respect to his business.

By the Court.—The judgment of the circuit court is affirmed.

ATKINSON, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

September 9—September 29, 1903.

Railroads: Fences: Killing of horse on track: Open gate: Negligence: Court and jury: Contributory negligence: Proximate cause.

1. Defendant's section foreman, charged with the duty of keeping the railroad fence in repair and gates closed, saw a gate open on Saturday afternoon, and people haying in the adjoining field who, to his knowledge, had been accustomed to leave the

gate open on their departure. He did not then close the gate, nor did he return on the following day, during which plaintiff's horse passed through the open gate upon the right of way and was killed. *Held*, that the question of defendant's negligence was one for the jury.

2. Plaintiff, who had left the horse in his pasture at some distance from the gate in question and inclosed by a good and sufficient fence, was not guilty of contributory negligence merely because, a week before the accident, while taking the horse to the pasture, he had passed through said gate over the premises of another person, and had left the gate open as he found it; nor was there any causal connection between his so leaving the gate open and the accident, it appearing that the gate had been closed several times in the interval.

3. The statute (sec. 1810, Stats. 1898) does not limit the liability of railway companies, for failure to maintain fences, to cases where an ordinarily prudent person might have anticipated that animals would probably enter upon the right of way, but imposes an absolute liability for any which do so enter and are injured by reason of such failure, subject only to the defense of contributory negligence.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

Plaintiff lived some little distance south of the defendant's railway track, and owned an extensive pasture lying on the north side of the track and somewhat to the westward of his residence. On August 18th he sent a hired man to put a horse into said pasture. They entered upon the right of way of the defendant, proceeded westward a distance, and found an open farm gate into the premises of a third person, through which the hired man took the horse, and proceeded from a quarter to half a mile further westward to the plaintiff's pasture and put the horse in, carefully repairing the pasture fence, so that there is no question as to the sufficiency thereof. He did not close the farm gate through which he passed. During the ensuing week the farm gate was frequently, if not continuously, open, and especially in the afternoon of the following Saturday, the 24th of August, it was observed to be open by the defendant's section foreman, whose duty it was to

look after the condition of the fences. He noticed that haying was in progress near the gate, and did not close it, and did not see it again until the following Monday. Some time during Sunday, the 25th, the plaintiff's horse, having escaped from the pasture without negligence on plaintiff's part, entered upon the defendant's right of way through this open gate, and was killed. This action was to recover damages on the ground of negligence of the defendant in failing to maintain its fences. The jury found that the defendant's section foreman was guilty of negligence in not seeing that the gate in question was closed before the horse was killed, and that, with the knowledge he had, a man of ordinary intelligence and prudence, in his position, ought to have reasonably anticipated that the gate would be left open if he did not close it. Upon this verdict judgment for the plaintiff was entered, from which the defendant appeals.

Edward M. Hyzer, for the appellant.

For the respondent there was a brief by *Sheridan & Evans,* and oral argument by *W. L. Evans.*

DODGE, J. 1. Refusal to direct verdict for defendant. Appellant's first contention in this connection is that there was no evidence of negligence on its part. It appeared that the section foreman charged with the duty of keeping the fence in repair and gates closed saw the gate open in the afternoon of Saturday, and people haying in the adjoining field who, to his knowledge, had been accustomed to leave the gate open on their departure, so that he had reason to believe they would do so on this occasion. He, however, went away and neither that night nor the next day, during which the plaintiff's horse was killed, did he return. We are unable to say, as matter of law, that such neglect was the care to be expected from an ordinarily prudent person under the circumstances. The defect in its fence being thus brought to the notice of appellant, it owed the duty of due diligence in

its repair. Sec. 1810, Stats. 1898; *Laude v. C. & N. W. R. Co.* 33 Wis. 640; *Curry v. C. & N. W. R. Co.* 43 Wis. 665; *Wickham v. C. & N. W. R. Co.* 95 Wis. 23, 26, 69 N. W. 982; *May v. C. & N. W. R. Co.* 102 Wis. 673, 79 N. W. 31; *Crosby v. D., G. H. & M. R. Co.* 58 Mich. 458, 25 N. W. 463; *Wabash R. Co. v. Perbex,* 57 Ill. App. 62; *Manwell v. B., C. R. & N. R. Co.* 89 Iowa, 708, 57 N. W. 441. What period of utter inaction was consistent with due diligence was a question of fact, involving consideration of many surrounding circumstances, and was properly one for the jury.

Appellant next contends that the evidence convicted plaintiff, or rather his hired man, of contributory negligence. The evidence designated as thus effective is that the hired man left this gate open as he found it when he went through on his way to the pasture and on his return. The jury have found that this occurred a week before the horse escaped, and the evidence is undisputed that the pasture was inclosed by an entirely safe and sufficient fence. We find difficulty in crediting counsel with seriousness in arguing that it is negligence *per se* for a farmer to leave a horse in a pasture inclosed by a good and sufficient fence because somewhere else a gate is open through which the horse might pass if once outside of the pasture. However, we cannot agree with the contention. Such conduct is too frequent with the mass of mankind to warrant us in so doing. Neither can we discover any contributory causal connection between leaving the gate open on August 18th and the passage of the horse through the same on the 25th, when, according to the testimony of appellant's sectionman, it was closed several times in the interval.

2. Error is assigned upon an instruction to the effect that, if the section foreman for the first time saw the gate open, but with a load of hay approaching it from the other side, he would have been justified in assuming that the person about to pass through would close the gate, and would have been under no obligation to pay any further attention; but, if he

knew it would be left open, then the question arose for the jury whether he exercised the care of an ordinarily prudent man under like circumstances. We have already declared our view that under such circumstances the question did properly arise for decision by the jury, and the instruction assailed went no further than to so state, wherein was no error. Whether the preliminary statement that there would have been no negligence if the foreman had not known the gate would be left open is accurate, might be subject to question (*Wabash R. Co. v. Perbex,* 57 Ill. App. 62), but, if erroneous at all, the statement errs in favor of the appellant.

3. The remaining assignment of error is alleged upon the ordering of judgment upon the special verdict, because there is contained therein no finding of proximate cause. It is admitted that the horse entered upon the right of way by the open gate. It is said by RYAN, C. J., in *Curry v. C. & N. W. R. Co.* 43 Wis. 676, that of course the open gate does not cause the injury to the horse; but the statute does not require this as a condition of the liability; merely that the result shall be occasioned by the absence of or defect in the fence, and that the injury from a train suffered by an animal which enters by means of such opening is occasioned thereby. Neither does the statute limit the company's liability to cases where an ordinarily prudent person might have anticipated that animals would probably enter upon the right of way, but imposes absolute liability for any which do enter by reason either of failure to fence or of negligent failure to maintain fence, subject only to defense of contributory negligence in the latter case. The lawmakers have legislatively assumed the probability that animals will enter on a railroad which is fenced either inadequately or not at all, and dispensed with the necessity of a finding that an ordinarily prudent man would anticipate such event. The railway company is subjected to the duty of fencing not alone for the benefit of the adjoining owner, but of the public at large. 3 Elliott, Rail-

roads, § 1190; *Curry v. C. & N. W. R. Co.* 43 Wis. 684; *Herrell v. C. & N. W. R. Co.* 114 Wis. 605, 609, 90 N. W. 1071. The danger to be averted, and which the statute assumes to be probable, is not only that to the adjoining owner's cattle lawfully on his premises, but to any others which may be there, either lawfully or as trespassers. *Curry v. C. & N. W. R. Co., supra; May v. C. & N. W. R. Co., supra; Herrell v. C. & N. W. R. Co., supra.* Hence the fact urged by appellant that the owners of the land adjoining this fence were not accustomed to pasture cattle there in no wise absolved the appellant from the liability imposed by the statute in case of negligent omission to maintain its fence. We are entirely satisfied that the verdict in this case found all the controverted facts necessary, in connection with those uncontroverted, to warrant the judgment in plaintiff's favor.

By the Court.—Judgment affirmed.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant, vs. FOX RIVER ELECTRIC RAILWAY & POWER COMPANY, Respondent.

September 9—September 29, 1903.

Street railways: Crossing steam railways: Contract to pay flagman, upon whom binding: "Successors": Sale of equipment: Use of crossing by purchaser: Covenants running with land.

1. The purchase by a street railway company of the personal property constituting the equipment of an existing street railway, in place, "not including the franchises, leases, contracts, or powerhouse machinery," did not carry with it any obligation to perform a contract by the terms of which the original builder of the street railway had obtained the right to cross the tracks of a steam railway and had agreed to pay the expense of keeping a flagman at such crossing.
2. It appearing that the original builder of the street railway had

no valid franchise and no right to the possession of the street, and that no franchises, leases, or contracts were included in the sale of the equipment to the street railway company, the fact that the latter, in operating its street railway system under its own franchise, used the crossing in question with the equipment purchased there in place, did not render it the successor of the original builder so as to be bound by his contract.

3. Since the agreements in the contract were in their nature personal obligations relating to the operation of the respective railways at the crossing, and it did not grant to the original builder of the street railway any rights to the use of the real estate which were not an incident to a valid franchise for operating a street railway, it cannot be held that the contract was binding upon the street railway company upon the ground that its benefits attach to the fee of the street at the crossing, which, subject to the public easement, was in the steam railway company.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

The respondent's street railway crosses appellant's steam railway on Third avenue, in the city of Green Bay.

By an ordinance of the common council, on August 24, 1894, one David McCartney was granted a franchise to build a street railway in the city of Ft. Howard, now part of the city of Green Bay. He constructed a street railway, which was operated on the streets specified in this ordinance. Appellant railway company is owner in fee of the land abutting on the street where the street railway crosses the track of the steam railway. On November 5, 1894, a contract was executed, under seal, between McCartney and appellant, in which, among other things, it was agreed:

"If at any time hereafter the business of the party of the first part [*C. & N. W. R. Co.*], or the laws of the state of Wisconsin, the ordinances of any municipal corporation of said state, or any other competent authority, or any agreement between the said party of the first part and any municipal corporation of said state, shall make it necessary to station flagmen at said crossing or shall make it necessary or

proper to erect crossing signals or gates thereat, or shall require that said crossing be protected by a system of interlocking or derailing switches and signals, or if in the judgment of the party of the first part the safety and convenience of the parties hereto require that said crossing be so protected, in any such case, the party of the first part shall have the right to employ such flagmen or to establish such signals and gates, and the party of the second part will pay all the wages of such flagmen promptly as the same become due from time to time."

The contract was made binding upon the heirs, personal representatives, successors, and assigns of the parties. The street railway crossing was constructed after this contract was made. The rails of the steam railway were cut, and the trolley wire crossed over its track and right of way.

On or about July 1, 1899, McCartney's executors sold and conveyed to the McCartney Street Railway & Power Company all the rights, franchises, and privileges granted him by ordinances of the city, and also all his or their interest in the rails, poles, ties, wires, cars, right of way, and all other property and interest belonging to the electric railway. October 20, 1899, the McCartney Street Railway & Power Company conveyed, under a sale, to respondent company, all the rails, ties, wire, poles, cars, switches, turnouts, curves, and other personal property constituting the street railway equipment of this railway, excepting and "not including franchises, leases, contracts, or powerhouse machinery." On September 25, 1899, the city of Green Bay granted respondent the right to extend its line on Broadway, formerly Third avenue.

On March 23, 1900, this action was brought to compel respondent to pay the wages of the flagman at this crossing, under the provisions of this agreement. Respondent operates a trolley railway for carrying passengers. Its tracks cross appellant's tracks on Broadway and Fifth avenue, at the same place on the street where the McCartney Street Railway crossed it when originally constructed. The street existed

prior to the time appellant became the owner of the abutting land. Appellant maintained a flagman at this crossing, as required by an ordinance, paying him his wages, which respondent refuses to pay appellant. This action is brought to recover the same.

Edward M. Hyzer, for the appellant, contended, *inter alia,* that the contract between McCartney and the plaintiff was supported by many considerations: (1) The seal imports a consideration. Sec. 4195, Stats. 1898; *Carey v. Dyer,* 97 Wis. 554. (2) The grantee obtained the right to make the crossing without delay, without litigation, without expense. (3) The grant was greater than any original right which it may be conceded for the purposes of argument the grantee possessed, in that it permitted a particular method of making the crossing. That contract is binding upon defendant. It granted to McCartney, his heirs and assigns, an estate in perpetuity, which he and they might enjoy whether the *locus in quo* remained a public street or not. The covenant to pay the flagman is a covenant running with the estate conveyed. It is a covenant touching and concerning the estate conveyed and relating directly to the enjoyment of it. *Noonan v. Orton,* 4 Wis. 335; *Wooliscroft v. Norton,* 15 Wis. 198; *Crawford v. Witherbee,* 77 Wis. 419; *Ecke v. Fetzer,* 65 Wis. 55; *Martineau v. Steele,* 14 Wis. 272, 276. Because the McCartney people took possession of the right in question by grant and delivered such possession to the defendant, and because the defendant continued to enjoy the McCartney possession, *in the very manner and with the identical appliances adopted by the McCartney people in pursuance of the grant,* and because the defendant had full notice of the contract, and of the conditions, covenants, and agreements therein contained, and because those covenants, agreements, and conditions run with the estate conveyed, the defendant was bound by the contract, its conditions, covenants, and agreements.

For the respondent there was a brief by *Greene, Fairchild,*

North & Parker, and oral argument by *B. H. Stebbins.* They argued, among other things, that the contract between plaintiff and McCartney was void. There was no consideration for McCartney's promises. Assuming that he had a valid franchise to construct and operate a street railway on and along the street, he could have done just as he did, without any contract. *Southern R. Co. v. Atlanta R. & P. Co.* 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125; *Chicago, B. & Q. R. Co. v. Beatrice R. T. & P. Co.* 47 Neb. 741, 66 N. W. 830; *Chicago & C. T. R. Co. v. W., H. & E. C. St. R. Co.* 139 Ind. 297, 26 L. R. A. 337, 339; *Chicago, B. & Q. R. Co. v. W. C. St. R. Co.* 156 Ill. 255, 29 L. R. A. 485 and note; *General E. R. Co. v. C. & W. I. R. Co.* 184 Ill. 588, 56 N. E. 963; *New York, N. H. & H. R. Co. v. Bridgeport T. Co.* 65 Conn. 410, 29 L. R. A. 367, 373; *Elizabethtown, L. & B. S. R. Co. v. A. & C. St. R. Co.* 16 Ky. L. R. 42; *Central P. R. Co. v. P. W. & B. R. Co.* 95 Md. 428, 52 Atl. 752; Elliott, Railroads, § 1135; *West Jersey R. Co. v. C., G. & W. R. Co.* 52 N. J. Eq. 31, 29 Atl. 423; Nellis, Street Surface Railroads, 186. Plaintiff's ownership of the fee makes no difference in this respect. *Williams Valley R. Co. v. L. & W. V. St. R. Co.* 192 Pa. St. 552, 44 Atl. 46. The right to cross plaintiff's tracks included a right to cut the rails and to pass the trolley wire over them. *Central P. R. Co. v. P. W. & B. R. Co.* 95 Md. 428, 52 Atl. 752; *West Jersey R. Co. v. C., G. & W. R. Co.* 52 N. J. Eq. 31, 29 Atl. 423. But McCartney had no valid franchise (*Allen v. Clausen,* 114 Wis. 244), and therefore the contract was for a right which he could not lawfully exercise, and any action on it must fail. 15 Am. & Eng. Ency. of Law (2d ed.) 997, 998; *Wight v. Rindskopf,* 43 Wis. 344; *Milwaukee M. & B. Asso. v. Niezerowski,* 95 Wis. 129. In any case the contract does not bind the defendant. It is not an assignee of the contract. *Menasha v. M. & N. R. Co.* 52 Wis. 414, 420; *Hoard v. C. & O. R. Co.* 123 U. S. 222. Nor did it impliedly or by operation of law become

bound. It bought the materials in use at the crossing, but it bought no right to keep them there. That right it had in advance by its franchise from the city. McCartney's promises were not covenants running with the estate purchased and so binding on defendant, because: (1) The property purchased had never been owned by plaintiff. (2) The property purchased was personalty only, and a "covenant can only be annexed to an interest in realty." 8 Am. & Eng. Ency. of Law (2d ed.) 135; *Morse v. Garner,* 1 Strob. L. (S. C.) 514, 47 Am. Dec. 565. (3) If the contract gave McCartney an easement, that easement was not conveyed to defendant. (4) If a covenant is to pay money only, especially if it is to pay it in the future or on some contingency, it is *personal,* and does not run with the land or bind any assignee or successor. *Hartung v. Witte,* 59 Wis. 285, 295; *Menasha v. M. & N. R. Co.* 52 Wis. 414; *Harkins v. Doran* (Pa. St.), 15 Atl. 928; *Atlanta C. St. R. Co. v. Bagwell,* 107 Ga. 157, 34 S. E. 184, 185; *Gibson v. Holden,* 115 Ill. 199, 208; *Graber v. Duncan,* 79 Ind. 565; *Kettle River R. Co. v. E. R. Co.* 41 Minn. 461, 6 L. R. A. 111; *Hurd v. Curtis,* 19 Pick. 459; *Dickey v. Kansas City & I. R. T. R. Co.* 122 Mo. 223, 26 S. W. 685, 687. The use of the words "successors and assigns" in the contract is unimportant. *Kettle River R. Co. v. E. R. Co.* 41 Minn. 461, 467; *Gibson v. Holden,* 115 Ill. 199, 208; *Menasha v. M. & N. R. Co.* 52 Wis. 414; *Mygatt v. Coe,* 147 N. Y. 456. Defendant is not liable as a succeeding corporation. *Menasha v. M. & N. R. Co.* 52 Wis. 414; *Pennison v. C., M. & St. P. R. Co.* 93 Wis. 344; *Vilas v. M. & P. du C. R. Co.* 17 Wis. 497, 502; *Wright v. M. & St. P. R. Co.* 25 Wis. 46; *Hoard v. C. & O. R. Co.* 123 U. S. 222; *National F. & P. Works v. Oconto C. W. S. Co.* 105 Wis. 48, 56.

SIEBECKER, J. The respondent, as purchaser of the property, by contract with the McCartney Street Railway & Power Company of August 21, 1899, and a conveyance of it on Oc-

tober 20, 1899, did not expressly undertake to perform the conditions of the agreement upon which the appellant bases its right to recover in this action. The agreement of sale and the conveyance were in terms of personal obligations, binding upon the parties only. They express nothing to indicate that the parties intended respondent should be required to pay the expense of a flagman provided for in the original agreement between appellant and David McCartney, the original builder and operator of the street railway. Respondent apparently sought to avoid assuming any of the obligations which were cast upon David McCartney for the maintenance of this crossing. It was specifically agreed that the purchase thus made was to include all the rails, ties, wire, poles, cars, switches, turnouts, curves, and other personal property constituting the equipment of this street railway, but stipulating that the transfer thus made was "not including the franchises, leases, contracts, or powerhouse machinery."

Then, again, the agreement conveys nothing but the personal property therein described. The sale of this personal property to respondent could not transfer any burden, duty, or obligation imposed on McCartney as a party to the contract, unless it assumed such burden, duty, or obligation as assignee.

That respondent was not the assignee sufficiently appears. Can it be said that it was the successor of David McCartney in operating its street railway system over this crossing? This view is met with the unsurmountable objection that McCartney had no valid franchise, nor any right of possession to the street, and that no "franchises, leases, contracts, or powerhouse machinery" were attempted to be transferred and conveyed to respondent. The respondent had a franchise from the city to operate and maintain a street railway over and upon the streets of the city at the place of crossing. The right to possession of the street under its own franchise and to maintain a street railway system is unquestioned. Its purchase

of the personal property of the former company in place on the street, using and occupying the same place, while operating its street railway system, under its franchise, is no legal basis for holding it assumed the former owner's right of occupancy in the street at the place of crossing, and thereby had cast upon it the burden of paying the expense of maintaining this crossing. *Menasha v. M. & N. R. Co.* 52 Wis. 414, 9 N. W. 396; *Wabash, St. L. & P. R. Co. v. Ham,* 114 U. S. 587, 5 Sup. Ct. 1081; *Wright v. M. & St. P. R. Co.* 25 Wis. 46.

The appellant asserts that the agreement is one which in legal contemplation must have been intended by the parties to be perpetual, and its benefits attach to the fee of the land over which the street railway is constructed and operated. The contract is primarily concerned as to operating the two railroad properties, where both rightfully pass over this place in a public street. The fact that the steam and street railways occupy the same place on the land emphasizes the legal result that these railways on the land are entirely distinct and independent properties—a transfer of either or both of the railway properties would in no way affect the interest in the land over which they pass, nor would a conveyance of the land necessarily affect their right to the use of this place upon it.

The agreements embraced in the original contract were in their nature personal obligations, pertaining to the conduct of the respective railway enterprises, and did not attempt to grant any rights to the use of the real estate to McCartney which were not an incident to a valid franchise for operating a street railway. The right to use this land at the crossing does not arise out of this contract, nor can it be said that such use by the two railways is an interest in or annexed to the realty, but it is in its effect collateral and independent of the land as regards the tenure and enjoyment thereof. *Hartung v. Witte,* 59 Wis. 285, 18 N. W. 175; *Menasha v. M. & N. R. Co., supra; Kettle River R. Co. v. E. R. Co.* 41 Minn.

461, 43 N. W. 329; *Wiggins F. Co. v. O. & M. R. Co.* 94 Ill. 83; *Morse v. Garner,* 1 Strob. 514.

The foregoing conclusion is based on the assumption that the contract between appellant and David McCartney was valid. This is challenged by respondent. The view we have taken of the case makes it unnecessary to discuss this question. We must hold that the contract in question was not binding on respondent.

By the Court.—The judgment of the circuit court is affirmed.

BLOHOWAK, Appellant, vs. GROCHOSKI, Respondent.

September 9—September 29, 1903.

Trial: Special verdict: Change by court, when justified: Appeal: Remanding for new trial: Watercourses: Evidence.

1. To justify a court in changing an affirmative answer by the jury to a negative one, such affirmative answer must be contrary to the undisputed credible evidence.
2. The evidence in this case (stated in the opinion) tending to show the existence of a natural watercourse over the plaintiff's land and upon that of the defendant, is *held* sufficient to make the question one for the jury.
3. A stream does not cease to be a watercourse because at a certain point it spreads out and flows for a distance over level land without defined banks before flowing again in a definite channel.
4. Where the trial court changed a special verdict and rendered judgment accordingly, this court, on reversing the judgment upon the ground that such change was unwarranted, may, under sec. 3071, Stats. 1898, remand the cause for a new trial.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Reversed.*

This is an action at law to recover $600 damages for unlawfully and wrongfully filling up an alleged watercourse, with bed and banks and a well-defined channel through which

water flowed during the greater part of the year, immediately below and north of the north line of the plaintiff's premises, described, and thus causing the water to set back upon and overflow the plaintiff's premises. The answer admits that the plaintiff was the owner of the land described, and that the north end thereof adjoined the land of the defendant, but denied the existence of the alleged watercourse or any watercourse. At the close of the trial of such issues the jury returned a special verdict, the first question and answer of which are as follows: "(1) Is there a natural watercourse flowing from the plaintiff's land onto the defendant's land? *Answer.* Yes." The other questions were answered to the effect (2) that about October 15, 1896, the defendant dammed up said watercourse so as to cause the water to back up onto the plaintiff's land, (3) and by reason of said back water damaged the plaintiff's lands to the extent of $2 per acre for fifteen acres, and for five years, $150. Thereupon the plaintiff moved the court for judgment upon the special verdict, and the defendant moved the court to strike out the answer "Yes" to the first question, and insert in lieu thereof "No," which motion was granted. The court thereupon ordered that the answer of the jury to the first question be changed from "Yes" to "No," as indicated, and that upon the verdict so amended the complaint as amended be dismissed, and that the defendant recover his costs and disbursements in this action, and ordered judgment to be entered accordingly. From the judgment so entered the plaintiff appeals.

For the appellant there was a brief by *Calkins & McGruer,* and oral argument by *L. A. Calkins.*

N. J. Monahan, for the respondent.

CASSODAY, C. J. This is an action at law triable by jury as a matter of right. This being so, the order of the trial court changing the answer of the jury to the first question from the affirmative to the negative can only be sustained

on the ground that the finding of the jury was contrary to the undisputed credible evidence. In granting the motion of the defendant to so change the verdict the trial court filed a carefully written opinion, reviewing the evidence, and reached the conclusion that the water complained of was mere surface water and did not have the essentials of a watercourse, as defined by the authorities. That court, having heard the witnesses, was undoubtedly in a better position to determine the preponderance of the testimony and the weight of the evidence than this court. Had this been an equitable action and the verdict merely advisory, this court would undoubtedly have felt bound by the action of the trial court. The same is true if this case had been tried by the court without a jury. So, even in jury cases, the trial court has a broad discretion in setting aside verdicts as against the preponderance of the evidence, and granting a new trial. *Schillinger v. Verona,* 85 Wis. 595, 55 N. W. 1040, and cases there cited; *Farley v. C., M. & St. P. R. Co.* 89 Wis. 206, 61 N. W. 769. But to justify a court in directing a verdict or changing the answer of the jury from the affirmative to the negative, as here, the finding of the jury must be contrary to the undisputed credible evidence. In determining whether such verdict was contrary to the undisputed evidence, the trial court, as well as this court, was bound to consider the evidence in support of the verdict in the most favorable light it would legitimately bear. *Renne v. U. S. L. Co.* 107 Wis. 320, 83 N. W. 473, and cases there cited. So considered, can we say that the evidence in behalf of the plaintiff is insufficient to sustain the finding of the jury?

To appreciate the evidence, the general situation should be considered. The plaintiff and defendant each own eighty acres of land, together constituting the W. half of the E. half of section 13, the plaintiff owning the south eighty and the defendant the north eighty. One Jensen owns the eighty immediately east of the plaintiff's land, and on the southeast

corner of that eighty, and about forty rods from the plaintiff's land, there is a large willow swamp, extending south onto section 24. That swamp is from thirty to forty rods wide from east to west, and about one hundred rods long from north to south. There is also a small swamp on Rasmussen's land immediately west of the south half of the plaintiff's land. About forty rods north of the plaintiff's land, and a little west of the east line of the defendant's land, is a small pond, and about fifty rods northwesterly from that there is a still larger pond on the defendant's land. It is conceded that the water from the large swamp drains off westerly and northerly onto the plaintiff's land, and thence onto the defendant's land, and also in a southeasterly direction from the portion of that swamp on section 24. Such is the general situation. It is stated by the trial judge, in effect, that some twenty-five or thirty years ago that large willow swamp extended northwesterly across the land now owned by the plaintiff, and nearly half way across the defendant's south forty, and to the small pond, and that the water in part from the large willow swamp drained off north into that small pond, and from thence northwesterly into the large pond, mentioned, and from thence north to a creek, and at times it ran off in such quantities and with such rapidity during several months of the year as to form quite a stream between the large pond and the creek; that while the timber was standing and the soil uncultivated the water would stand in the large willow swamp during the greater part of each season, and in very wet seasons the water would drain into and run out of the pond during the whole season; that after the timber was cut from most of the land in the two sections mentioned, and the land became cultivated except in a few spots where the timber had not been cut, the water was much more absorbed and less water was drained onto the low ground, and the same more quickly disappeared by being drawn off, absorbed, and evaporated; that the result was that, with the exception of one or

two acres, the land in section 13, west of the plaintiff's land, became and was fit for cultivation; that the natural drainage of about 900 acres was into the basin constituting the original bed of the big willow swamp; that there never was, however, any channel from the big willow swamp to the small pond, but that the water drained across the plaintiff's land into the swamp and thence into the small pond through furrows and ditches constructed by the plaintiff; that there are places south and west of the swamp where in times of melting snow and heavy rains the water runs towards and into the swamp in such quantities as to form streams; that furrows or depressions are left through the field for such flow, which are bridged when crossed by the highway; that none of the water flowing into the swamp comes from living springs, but is surface water; that the defendant dammed up the northern end or outlet of the small pond, and thus retarded the natural flow of the water, and damaged the plaintiff's land.

Such is a general summary of the situation as given by the learned trial judge. There is evidence tending to prove that the water came onto the plaintiff's land from surrounding farms, in the first place from rains and snows, and perhaps from springs, and ran all over the flats, and gathered in the middle of the flats in one corner at the plaintiff's north line; that several years ago the plaintiff dug a ditch three or four feet wide and one foot deep to better drain his land, although the water would flow off without it, but not as well; that before the ditch was dug the water ran from the big swamp down onto the plaintiff's land, and over and upon the defendant's land; that the water flows now in the ditch for several months in the year, the same as before the ditch was dug, but faster, and it is seldom dry, even in dry weather; that the plaintiff's land is a very little higher than the defendant's land; that the creek flowed all the time between the two ponds; that the water from the swamps emptied into the small pond or swale hole which contained water the year round;

that where the water flows from the plaintiff's land onto the defendant's land it is flat—three or four rods wide where it crosses the line; that when the small pond is full the water extends up to the plaintiff's land; the plaintiff's ditch stops at his north line, and from there the water flows north over the flat to the small pond; that there was formerly a creek running from the west onto the plaintiff's land, and also from the southeast onto the plaintiff's land—then about eight feet wide—with banks and fish in it, which flowed from the plaintiff's land crossing the line near the plaintiff's northeast corner, and that such creek had a bridge across it, but there is no creek there now; that the ground where it was has been plowed and filled up, and there is dirt and stuff where the natural watercourse was, but down below it was never touched with a plow, because there was water there all the time—water there at the time of the trial—from the defendant's dam up to where it was plowed. Of course, there was much evidence tending to prove that there was no watercourse, and undoubtedly the trial court regarded such evidence as controlling. But can we say, and was the trial court justified in saying, as a matter of law, that it appears from the undisputed credible evidence that there was no watercourse flowing from the big swamp to the small pond—from the plaintiff's land onto the defendant's land?

It is sometimes difficult to distinguish between a watercourse and mere surface water. Much may depend upon soil and other surroundings and conditions. It is well known that certain Western streams—some marked as rivers upon the map—have quite extended sections which for months are perfectly dry. In defining a watercourse, Chief Justice DIXON said:

"There must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks, and usually discharge itself into some

other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes." *Hoyt v. Hudson,* 27 Wis. 661.

That case was followed in *Eulrich v. Richter,* 37 Wis. 226, where the facts were quite similar to the case at bar, and where the court directed a verdict. But the judgment was reversed, and a new trial ordered, because "the facts of the case are not so clear and undisputed as to warrant the court in withdrawing from the jury the question whether the *locus in quo* was a natural watercourse." *Id.* 37 Wis. 227, 230. So this court has held, in effect, that streams having their origin in the overflow of a river or other watercourse, by reason of unusual freshets, although they had no well-defined channels or banks, but spread widely over the intervening ground, were, nevertheless, watercourses. *Spelman v. Portage,* 41 Wis. 144; *Barden v. Portage,* 79 Wis. 133, 48 N. W. 210. These cases were followed in *Case v. Hoffman,* 84 Wis. 445, 446; *S. C.* 100 Wis. 323, 75 N. W. 945. It has been held in Indiana that "water which has a definite source in a spring, and takes a definite course, is a watercourse, which cannot be lawfully diverted from its natural channel so as to injure another's land, although at a certain point it spreads over marshy ground, without a defined channel, where it again flows in such a channel." *Mitchell v. Bain,* 142 Ind. 605, 42 N. E. 230.

"In an action for diverting a brook from the plaintiff's land" in a Massachusetts case, "it appeared that, at a point on the defendant's land below the place of the alleged diversion, the water ceased to flow between defined banks, spread itself out several rods wide, and ran so, over the surface of the ground, for five rods, to the plaintiff's land, across which it spread, and ran for seven rods in like manner, and then began to flow again in a defined channel, which conducted it into a river. Held, that the brook did not cease to be a natural watercourse on the plaintiff's land, and that he could maintain the action." *Macomber v. Godfrey,* 108 Mass. 219.

Mr. Gould states the rule applicable thus:

"A stream does not cease to be a watercourse and become mere surface water because at a certain point it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel." Gould, Waters (3d ed.) § 264, citing numerous cases in support of the text.

Quite similar language is used in 28 Am. & Eng. Ency. of Law, 944–946. Within the rules of law stated, the evidence is certainly sufficient to authorize a finding that twenty-five or thirty years ago there was a watercourse from the big swamp onto the plaintiff's land, and from thence onto the defendant's land, and into the small pond; and, although the flow of water has been much less since the timber has been cut off and the land cultivated, still we are constrained to hold that the credible evidence was sufficient to take the case to the jury on the first question submitted.

The conclusion reached raises a question as to what should be the mandate of this court. Shall it be with direction to enter judgment upon the verdict or for a new trial? The statute declares that "upon an appeal from a judgment" this court "may reverse, affirm, or modify the judgment . . . as to any and all of the parties, and may, if necessary *or proper, order a new trial.*" Sec. 3071, Stats. 1898. This court held several years ago that this power given by statute "to affirm, reverse, or modify a judgment in part, and order a new trial, necessarily confers the power upon this court to order a new trial as to the part of the judgment reversed." *Braunsdorf v. Fellner,* 76 Wis. 18, 45 N. W. 97. In a late case it is said that, under the power given by that section, the custom of this court "has been generally to apply the law to the facts as they appear to us, and direct the court below as to its judgment or other further proceeding." *Hill v. Am. Surety Co.* 107 Wis. 34, 81 N. W. 1024, 82 N. W. 691. It is there further said, among other things, that "the policy

of this court is . . . . to remand issues for retrial only when necessary to sure and complete justice, yielding, as every policy must, to the constitutional assurance of the right to trial by jury in certain situations." *Id.* The motion of the defendant was to strike out the affirmative answer to the first question, and insert in lieu thereof a negative answer. The trial court certainly had the discretionary power to set aside the verdict as against the clear preponderance of the evidence and grant a new trial. This is abundantly shown by cases cited at the beginning of this opinion. But no such motion was made. The finding of the trial court that the verdict of the jury was contrary to the undisputed evidence, however, makes it certain that in the judgment of that court the verdict should not be allowed to stand. The term at which the cause was tried has passed by, so that the trial court is not now in a position to exercise its discretionary power. To allow the verdict to stand under such circumstances would be doing an injustice to the parties and in disregard of the convictions of the trial court. Under the statute we are convinced that we have the power to order a new trial, and that it is our duty to do so.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

PETERSON, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

September 9—September 29, 1903.

Railroads: Negligence: Injury to express messenger: Contract exempting from liability: Public policy: Contract for benefit of third person.

1. **A contract exempting a railway company from liability to an express messenger for personal injuries sustained by him, while riding on its trains in performance of his duty, by rea-**

son of the ordinary negligence of the railway employees, is not against public policy and is valid.

2. An agreement by an express messenger, made upon entering the employment of an express company, to exempt said company and the transportation companies with which it dealt from all liability for personal injuries whether arising from negligence or otherwise, and that this stipulation should inure to the benefit of all such transportation companies as fully as if made directly with them, is a bar to a recovery by him against a railway company for injuries caused by the negligence of its employees while he was riding on its train in the performance of his duty as such messenger, whether the railway company knew of or assented to such agreement before the commencement of the action or not.

APPEAL from an order of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

This is an action to recover for personal injuries. The complaint alleges that the plaintiff was an express messenger in the employ of the American Express Company, and that in the course of his employment, and on the 27th day of March, 1901, he was riding in the express car of the defendant's passenger train running from Milwaukee to Green Bay, and that said train, by the negligence of defendant, ran into a freight train, by reason of which collision the plaintiff suffered severe personal injuries.

The answer alleged, in substance, that at the time of said collision there was existing and in force between the defendant and the American Express Company a written contract providing for the transportation of express matter and the necessary employees of the express company over the defendant's lines, which contract contained the following provision, among others:

"*Seventh.* As one of the express conditions of this contract the express company hereby binds and obligates itself to save harmless and fully indemnify the railway company and its officers and employees from and against all actions and liabilities for loss or damage resulting in any manner whatever to the property of, or freight and express matter in

charge of the express company, or to any of its employees, agents, messengers, or officers while traveling as aforesaid upon any line covered by this agreement, it being distinctly understood and agreed that all damages resulting to express matter or to the property of the express company or to persons engaged in the service of the express company while engaged in such service, shall be borne by the express company."

That at the same time there was a contract in force between the plaintiff and the American Express Company which contained the following provisions:

"Now, therefore, in consideration of the premises and of my said employment, I do hereby assume all risk of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employee of any such corporation or person or otherwise, and whether resulting in my death or otherwise. And I hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made or may hereafter make, arising out of any claim or recovery upon my part, or on the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence of any person or corporation or of any employee of any person or corporation, or otherwise. And I hereby bind myself, my heirs, executors and administrators with the payment to such express company, upon demand, of any sum which it may be compelled to pay in consequence of any such claims, or in defending the same, including all counsel fees and expenses of litigation connected therewith. I do further agree that in case I shall at any time suffer any such injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning or operating such railroad, stage or steamboat line upon which I shall be injured, a good and sufficient release under my hand and seal of all claims, demands and causes of action arising out of such injury or connected with or resulting therefrom. And I do

hereby ratify all agreements heretofore made by said express company with any corporation or persons operating any railroad, stage or steamboat line in which said express company has agreed in substance that its employees shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every of such agreements in so far as the provisions thereof relative to injuries sustained by employees of the company are concerned, as fully as if I were a party thereto. And I do hereby authorize and empower said express company at any time while I shall remain in its service, to contract for me and on my behalf in its own name or in mine with any corporations or persons operating any railroad, stage or steamboat line, for my transportation as messenger or employee free of charge upon the condition and consideration that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporations or persons or of any employee of such corporations or persons or otherwise, and the contract so made shall be as binding and obligatory upon me as if signed and delivered by me. And I do hereby further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation and to all persons upon whose railroad, stage or steamboat line the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons."

The plaintiff demurred generally to the answer, which demurrer was overruled, and the plaintiff appeals.

For the appellant there was a brief by *Sheridan & Evans,* and oral argument by *W. L. Evans.* They argued, *inter alia,* that the contract between the express company and the plaintiff in this action is void as against public policy so far as it purports to absolve the express or railway companies from liability for their negligence. 1 Bailey, Pers. Inj. §§ 1054, 1060; *Little Rock & Ft. S. R. Co. v. Eubanks,* 48 Ark. 460, 3 S. W. 808; *Purdy v. R. W. & O. R. Co.* 125 N. Y. 209, 26 N. E. 255; *Lake Shore & M. S. R. Co. v. Spangler,* 44 Ohio

St. 471, 8 N. E. 467; *Starr v. G. N. R. Co.* 67 Minn. 18, 69 N. W. 632; *Johnson's Adm'x v. R. & D. R. Co.* 86 Va. 975, 11 S. E. 829; *Louisville & N. R. Co. v. Orr,* 91 Ala. 548, 8 South. 360; *Kansas P. R. Co. v. Peavey,* 29 Kan. 169; *Richmond & D. R. Co. v. Jones,* 92 Ala. 218, 9 South. 276; *Roesner v. Hermann,* 8 Fed. 782, 34 Cent. Dig. col. 643; *Runt v. Herring,* 2 Misc. Rep. 105, 21 N. Y. Supp. 244; *Simpson v. N. Y. Rubber Co.* 30 N. Y. Supp. 339; *Chicago, W. & V. C. Co. v. Peterson,* 39 Ill. App. 114. The express company and the railway company cannot do together what neither can do alone in depriving an employee of remedy for the negligence of either. The plaintiff was a passenger for hire upon the road of the defendant. It is admitted that a railway owes the same degree of care to mail agents riding in postal cars as to those who are passengers on the train, and there is no reason why the same rule should not apply to express messengers; and they are held to be passengers and entitled to relief for negligence in many cases. *Chamberlain v. M. & M. R. Co.* 11 Wis. 238; *Yeomans v. Contra Costa S. N. Co.* 44 Cal. 71; *Fordyce v. Jackson,* 56 Ark. 594, 20 S. W. 528; *San Antonio & A. P. R. Co. v. Adams,* 6 Tex. Civ. App. 102, 24 S. W. 839; Hutchinson, Carriers, §§ 564, 565 and cases; *Brewer v. N. Y., L. E. & W. R. Co.* 124 N. Y. 59, 11 L. R. A. 483; *Kenney v. N. Y. C. & H. R. R. Co.* 125 N. Y. 422, 26 N. E. 626; *Jennings v. G. T. R. Co.* 15 Ont. App. 477; *Jones v. St. L. S. W. R. Co.* 125 Mo. 666, 26 L. R. A. 718.

For the respondent there was a brief by *Miller, Noyes & Miller,* attorneys, and *Greene, Fairchild, North & Parker,* of counsel, and oral argument by *George P. Miller.* To the point that plaintiff was not a passenger, and neither his contract nor that between the express company and defendant contravenes public policy, they cited *Baltimore & O. S. W. R. Co. v. Voigt,* 176 U. S. 498; *Louisville, N. A. & C. R. Co. v. Keefer,* 146 Ind. 21, 44 N. E. 796; *Pittsburg, C., C. & St. L. R. Co. v. Mahoney,* 148 Ind. 196, 46 N. E. 917; *Blank*

v. I. C. R. Co. 182 Ill. 332, 55 N. E. 332; *Hosmer v. O. C. R. Co.* 156 Mass. 506, 31 N. E. 652; *Bates v. O. C. R. Co.* 147 Mass. 255, 17 N. E. 633.

WINSLOW, J. The general question presented in this case is whether a railway company can be relieved by contract from liability to an express messenger for personal injuries suffered by him while riding on its train in performance of his duty, such injuries being proximately caused by the ordinary negligence of the employees of the company.

The question is new in this state. This court has held that a common carrier may by contract exempt itself from liability to a person traveling on a free pass for injuries caused by the ordinary negligence of its employees, but not from the consequences of their gross negligence. *Annas v. M. & N. R. Co.* 67 Wis. 46, 30 N. W. 282. Also that it is against public policy to allow a common carrier to stipulate for exemption from liability for negligence of its employees resulting in loss or injury to a passenger for hire. *Abrams v. M., L. S. & W. R. Co.* 87 Wis. 485, 58 N. W. 780. Neither of these cases, however, touches the exact question before us, nor does the early case of *Chamberlain v. M. & M. R. Co.* 7 Wis. 425, *S. C.* 11 Wis. 248, throw any light upon it.

The question is an interesting one, and might be discussed at great length. It seems doubtful, however, whether any good result would be reached by such a discussion. The exact question here presented has been discussed with great learning and ability by the supreme court of the United States in the case of *Baltimore & O. S. W. R. Co. v. Voigt,* 176 U. S. 498, 20 Sup. Ct. 385, and the result there reached was that an express messenger, under the facts here presented, was not a passenger for hire, and that for that reason the contracts exempting the railroad company from liability were not against public policy, but valid. We entirely agree with that result. It commends itself to our judgment, not

only upon reason, but upon the great weight of authority. The express messenger is not a person who has applied to a common carrier for transportation and is entitled to that transportation without condition, upon payment of his fare, but a person who voluntarily goes upon a train, not for transportation, but to transact certain business for the express company which it is allowed to transact, not because the railroad company is a common carrier, but because of a contract between the express company and the railroad company by which the express company and its messengers were granted rights which the railroad company could not be compelled to grant as a common carrier. We could add nothing to the discussion in the *Voigt Case,* and hence we content ourselves with announcing our concurrence with the doctrines there laid down.

It is said that there is a distinction between this case and the *Voigt Case* in that by the contract between the railway company and the express company in the *Voigt Case* the express company agrees to indemnify the railway company from all liability, whether resulting from negligence or otherwise, whereas in the case at bar the agreement is simply to indemnify against damage resulting in any manner whatever. It is said that such contracts are strictly construed against the railway company, and that there must be an express stipulation exempting the company from the results of negligence in order to effect that result, and *Black v. Goodrich T. Co.* 55 Wis. 319, 13 N. W. 244, is relied upon. It is not necessary in the present case either to affirm or deny that the agreement between the express company and the railway company covered injuries resulting from negligence, because in this case the plaintiff himself, when he entered on his employment, agreed to exempt the express company and the transportation companies with which it dealt from all liability for personal injuries whether arising from negligence or otherwise, and also agreed that this stipulation should

inure to the benefit of all such transportation companies as fully as if made directly with them. This was a promise, upon sufficient consideration, made to one person for the benefit of a third person, which could be enforced by such third person whether such third person knew of or assented to the promise before the commencement of the action or not. *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440, and cases cited.

By the Court.—Order affirmed.

CITY OF ASHLAND, Respondent, vs. NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

September 10—September 29, 1903.

Municipal corporations: Vacation of streets: Void ordinance: Occupation by railways: Estoppel.

By an agreement between railway companies and a city the former were to contribute to the improvement of a certain street and the city was to vacate parts of certain other streets to accommodate the railway yards and depots. The city passed an ordinance in form vacating said parts of streets, and the companies fulfilled the agreement on their part. The ordinance was void because statutory requirements were not complied with, and six or seven months after its passage it was repealed. In the absence of proof that defendant (one of said railway companies) had erected any structures or incurred any considerable expense in reliance upon the attempted vacation, it is *held* that the city is not estopped to claim that the streets had not been vacated. *Ashland v. C. & N. W. R. Co.* 105 Wis. 398, followed.

MARSHALL, J., and CASSODAY, C. J., dissent, being of the opinion that in view of all the circumstances (including the undisturbed occupancy of the streets by the railway companies for more than ten years, positive acts of encouragement on the part of the city to continue such occupancy, the expenditure of large sums by the railway companies in improvements, and the final creation of a situation from which they cannot recede without great loss) the city should be held estopped.

APPEAL from a judgment of the circuit court for Ashland county: JAMES O'NEILL, Judge. *Affirmed.*

This is a companion suit to that presented in *Ashland v. Chicago & Northwestern R. Co.* 105 Wis. 398, 80 N. W. 1101. To the statement of facts there made we now refer. A clear understanding of the situation, however, requires a little more amplification of the facts. The three railroad companies, or their predecessors, the Chicago & Northwestern, Northern Pacific, and Wisconsin Central, some time prior to 1887 owned a large tract of land in Ashland between Third street on the north and Sixth street on the south, and between Vaughn avenue on the west and Prentice avenue on the east, a distance of seven blocks east and west, which had been largely donated to them by the individual owners, and in that space had their depots, as also did the present defendant and the Wisconsin Central have their yards. The business part of the city stretched along Front street and Second street, and also along the lake shore, where the mills were situated; the most central part of that business portion being at about Third Avenue West. Meanwhile a considerable residence settlement had grown up to the south of this railway tract, access from which to the business portion would naturally be attained over the various avenues, including Second, Third, and Fourth Avenues West. The scheme of vacating streets and alleys embraced in the contract of October 1, 1887, and in the ordinance of December 1, 1887, involved the vacating of all the avenues through this tract except Ellis avenue and Third Avenue West, thereby cutting off the use of Second and Fourth Avenues West and of Second and Third Avenues East. Ellis avenue was to be a thoroughfare. Third Avenue West was not affected, but has since been wholly obstructed by a stone passenger station. At the time of the commencement of this action the three railroad companies had quite extensive switching yards within this tract, each of them having five, six, or seven tracks crossing

the avenues and substantially occupying Fourth and Fifth streets, and the defendant having put in place a roundhouse, small repair shops, and some other structures. To what extent this was an increase over what existed prior to 1887 is not proved, but the case was argued on both sides on the assumption that a very considerable amount of the expenditure had been since that time. But there was no proof that any part thereof had been made prior to the ordinance of June 26, 1888, repealing the vacating ordinance of the December previous. The present action affects both Second and Fourth Avenues West. There was no evidence that the defendant had erected any structures in either of these avenues, except as it had laid tracks across the same; nor was there evidence that any of the railroads had any structures in either of these streets, except that the Wisconsin Central freighthouse extended nearly across Second avenue, but that had been erected prior to 1887. The evidence is substantially undisputed to the effect that the opening and use of these two avenues for general travel will seriously incommode the railroad companies in the use of this territory for yard purposes; perhaps to an extent to force them to find other locations for their yards. There is also evidence that the Wisconsin Central has erected upon Third avenue an expensive passenger station, but not in reliance upon the claimed vacation of 1887. Whether by other authority, is not made to appear. There is no evidence as to whether the defendant did or did not have notice of the passage of the repealing ordinance of June, 1888, but it was stipulated that it was duly published, as required by the charter, on June 30, 1888.

The court found as a fact that between October 1, 1887, and September 9, 1888, no step was taken, and no act performed, money expended, or obligation incurred, by the defendant in reliance upon or induced by the passage of the vacating ordinance of December 1, 1887, or other acts of the common council of the city of *Ashland* or of the plaintiff,

growing out of or connected with the proposition of October 1, 1887; but that the defendant paid to the treasurer on September 9, 1888, $2,307.32, as its part of the cost of excavating Vaughn avenue and constructing a drain or box culvert therein. Judgment was entered in favor of the plaintiff, the result of which was to command the defendant to behave toward Second and Fourth avenues as if they were streets, instead of as if they were its property. From that judgment the defendant appeals.

For the appellant there was a brief by *Louis Hanitch,* attorney, and *C. W. Bunn* and *Emerson Hadley,* of counsel, and oral argument by *Mr. Hanitch.*

For the respondent there was a brief by *F. J. Colignon,* attorney, and *Dillon & Colignon* and *Tomkins & Tomkins,* of counsel, and a supplemental brief and oral argument by *F. J. Colignon.*

DODGE, J. This case, having been presented in two arguments, has been carefully examined and re-examined, to ascertain whether it is distinguishable from *Ashland v. C. & N. W. R. Co.* 105 Wis. 398, 80 N. W. 1101, so as to take it out of the rule established in that case. We find nothing of material distinction. The two actions, as also another against the Wisconsin Central Railway, were commenced at the same time, and issue joined by practically identical pleadings. The alleged contract between the railroads and the city and the action of the council and the citizens with reference to the streets relied on by appellant are common to both actions. The proof as to occupation of the streets and intervening blocks and expenditure of money thereon is for all legal purposes the same, although carried somewhat more into detail in this action. The time when any of the acts were done or expenditures incurred with reference to dates of ordinance purporting to vacate the streets and the repeal thereof is left no less vague now than it was in the former case. The proof

of acts by the citizens and by city officers by way of insistence upon right of passage and of maintaining sidewalks on Fourth avenue is, if anything, stronger and more definite in this record, as also is the proof that defendant had already established its depot and yards in their present locality before any of the acts on the part of the city council now urged as ground for belief in the abandonment of the streets. It is also made more clearly apparent that the portion of Fourth avenue on which an engine house and certain other city offices were built—some before and some after 1887—was not included in the vacation contract or ordinance. The only material distinction consists in that the trial court in the former case decided that facts were established to warrant a court of equity in arousing equitable estoppel, while in this case the trial court has decided the other way. In the *Northwestern Case* we were obliged to decide that there was a clear preponderance of evidence against such a state of facts as would justify estoppel, while in the instant case we need only to find absence of clear preponderance in favor of such state of facts. As a result of such comparison of the two cases we cannot but consider this ruled by the former, and affirm the present judgment, if the rule *stare decisis* is to control.

Some attempt—though in justice to appellant's counsel we must concede not a very urgent one—is made to assert that we held in the former case that the illegal action of the city council in contracting to vacate and in enacting vacating ordinance could not be given weight in deciding whether the conduct of the city and of the appellant had been such that the former must be held estopped to insist on the existence of these streets, and upon such assertion to predicate an argument against the soundness of the doctrine. We find no such position taken, as is apparent from the opinion, properly understood in the light of the discussion in the case. We—for our lamented brother, BARDEEN, J., spoke for the court, and with its hearty approval—first declared reaffirmation

of the doctrine of *Goodrich v. Milwaukee,* 24 Wis. 422, 436, and *Paine L. Co. v. Oshkosh,* 89 Wis. 449, 61 N. W. 1108, that acts and conduct on the part of a city might be such as to arouse equitable estoppel. Then we turned to the principal argument of the railway company's counsel—that, because the company paid money for grading Vaughn avenue as a consideration for a pretended contract to vacate certain streets, the city was estopped; which, as evinced by the findings, was a principal consideration with the trial court. As to that we said that such an attempted contract is not sufficient, for the reasons there well stated. To hold otherwise would be to deny all efficacy to laws restricting powers of city officers; would place the public at the mercy of those who might, by unprovable means, induce such officers to deliberately break such laws. We did not, however, declare that the attempted vacating of streets by a void ordinance might not be considered in association with other facts and circumstances, and the whole be held cogent enough to bring into operation an estoppel against a city. That we had no such intention is rendered plain by the very context of the opinion, pointing out that there was no clear and sufficient proof that the railway company had erected any structures or incurred any considerable expense in reliance upon that attempted vacation, they being chargeable with knowledge of its repeal. The necessity of proof of both the inequitable conduct of the city and great and irreparable wrong to parties honestly and in good faith relying thereon is well and properly declared. That is forcibly expressed by the courts of Illinois, on whose decisions the doctrine of *Paine L. Co. v. Oshkosh, supra,* largely rested. They have very recently had occasion to insist upon great caution in applying it. *Catlett v. People,* 151 Ill. 16, 24, 37 N. E. 855; *De Kalb v. Luncy,* 193 Ill. 185, 190, 61 N. E. 1036; *Shirk v. Chicago,* 195 Ill. 298, 63 N. E. 193. See, also, Elliott, Roads & Streets (1st ed.) 660. We find nothing in the rules of law laid down in *Ashland v. C. &*

N. W. R. Co. with which we cannot now agree, and therefore deem it controlling in the decision of the present case.

By the Court.—Judgment affirmed.

MARSHALL, J. (*dissenting*). If the decision of this case had been strictly confined, as it might well have been, to the single question of whether the finding of fact that appellant did not change its position on the faith of the vacating ordinance prior to the repeal thereof is against the clear preponderance of the evidence, I could concur with my brethren. Through some oversight, difficult to understand, the facts upon which the defense of equitable estoppel was based found no place in the findings of the court, and no exceptions were preserved covering the omission. Nevertheless the cause was twice argued here as if the question were before us of whether the judgment is right in view of the facts so omitted from the findings. Counsel for appellant presented its side of the litigation as if proper exceptions were preserved, and counsel for respondent joined in that treatment of the appeal. A re-argument was ordered wholly as to the effect upon the judgment of the facts not covered by the findings. This court considered such unfound facts, and upon the whole case decided that no equitable estoppel was established. In that situation I shall do as all others seem to have done,—treat the case as if proper exceptions were taken and preserved in the record, presenting the question of whether an equitable estoppel was established by the facts proved, not covered by the court's findings.

I concurred in the decision rendered in *Ashland v. C. & N. W. R. Co.* 105 Wis. 398, 80 N. W. 1101, not without serious misgivings as to its correctness. Reconsideration of the subject here involved, aided by a clearer presentation of the same facts in this case, satisfies me that error was there committed by reason of a failure to fully comprehend the scope of the doctrine of equitable estoppel as applied to municipal-

ities. I will endeavor to analyze the former opinion and show wherein I deem it infirm. That done, there will be little need to discuss the reasoning of the court upon this occasion, since it is not pretended that the present decision does more than affirm what was formerly decided.

Before proceeding to discuss the former opinion, however, I will state more fully than the court has done the facts of the case as I understand them to appear by the record. In my judgment the statement made by the court does not bring into clear light the strong circumstances from which arises a conviction that it would be unjust to compel the appellant to vacate the situation that it has occupied and enjoyed for some sixteen years. The statement of facts now made is not supposed to be in any way contradictory to that made by the court, but rather to be supplementary thereto. The trouble with the court's statement, from my view of the case, is that it makes the vital question in the litigation, whether appellant did anything or failed to do anything under the vacation ordinance, so called, of December 1, 1887, before receiving notice that it had been repealed. The trial court so viewed the situation in the former case, as did also, in my judgment, this court upon the appeal. The same is obviously true of the trial of this case below. In my judgment such circumstances do not necessarily cut any figure in determining the rights of the parties.

Much of the territory within the limits of the city of *Ashland* is platted and occupied, and has been for many years. Within the territory affected by this litigation the streets cross each other at right angles, those extending back from Chequamegon Bay and nearly at right angles with the shore thereof being called avenues. Those crossing the same and running nearly parallel with the shore are called streets. The thoroughfare nearest to and parallel with the bay is called Front street, while those parallel therewith are numbered consecutively, commencing with Second street. Fourth avenue

is one of the principal thoroughfares of the city. The width thereof is sixty-six feet. The platted blocks abutting thereon are 300 feet square. The cross streets are sixty-six feet wide. That part of the avenue particularly involved here is between Third and Sixth streets. Such avenue is one of the streets originally platted and dedicated. That occurred as early as 1857, and the avenue was then named Madison avenue. In 1887 the name was changed to Fourth avenue. It extended back from the bay in a southerly direction, through a thickly populated and business part of the city, about one and a half miles. Appellant's tracks extend across the territory between Third and Sixth streets, crossing Fourth avenue. That part of such avenue between Front and Third streets, prior to 1890, was prepared for public travel, and has since been used for that purpose. That part lying south of Sixth street was also, prior to 1890, so prepared, and has ever since been so used. Up to 1892 that part of the avenue between Third and Sixth streets had not been so improved, but the surface thereof was level and had been customarily used for travel. In 1892 the plaintiff built a sidewalk upon the west side of the avenue from Fourth street to Sixth street, which remained in place till February 9, 1897, when it was removed by defendant's predecessor. It has not since been restored. In 1885, defendant's predecessor constructed a railroad track through the corporate limits of plaintiff. About 1887 such track was connected with those of three other railroad companies within such limits, for the mutual convenience of all, to wit, the Northern Pacific Railroad Company, defendant's predecessor, the Chicago, St. Paul, Minneapolis & Omaha Railway Company, the Milwaukee, Lake Shore & Western Railway Company, and the Wisconsin Central Railway Company.

In 1887 those companies proposed to plaintiff to contribute $5,000 for the improvement of Vaughn avenue, a street running parallel with Fourth avenue and located two blocks and

the width of one street westerly therefrom, on condition that the city should vacate portions of certain streets and alleys, including that part of Fourth avenue between Third and Sixth streets involved in this litigation. The offer was accepted by resolution of the city council. That resolution provided for the improvement of Vaughn avenue and the doing of much other work contemplated by the proposition of the railway companies. The resolution further provided that upon the contemplated improvements being made measures should be taken to vacate streets and alleys as suggested by the railway companies. December 1, 1887, pursuant to the agreement between the railway companies and the city thus made, the latter passed and caused to be published, intending to exhaust its jurisdiction in the premises, an ordinance in form vacating those parts of streets and alleys agreed to be vacated, including that part of Fourth avenue now involved. The railway companies, within a reasonable time thereafter, complied with the agreement on their part as to paying the expense of improving Vaughn avenue. In 1888 plaintiff, treating that part of Fourth avenue which it had attempted to vacate as no longer a public thoroughfare, constructed a city building immediately south of Third street, entirely obstructing the avenue from such street north to the railway track. Appellant's predecessor, regarding the streets which the city had attempted to vacate as abandoned for public purposes, expended a large sum of money in the arrangement of its tracks and buildings for the purpose of conducting its business in the city, the outlay extending over a period of more than ten years. It will be irreparably damaged if the status of things thus created be now changed. The attitude of the city and people thereof prior to and at the time of, and for years subsequent to, the vacation proceedings, was such as to indicate a general desire that the railway companies should locate their yards, depot grounds and station facilities as they were located. The necessary result of such location, as could

easily have been seen from the outset, was the obstruction of Fourth, Third and Second avenues between Third and Sixth streets, and the disuse thereof, within such territory, as public streets. Appellant's predecessor paid into the city treasury, as its proportion of the cost of improving Vaughn avenue as aforesaid, $2,307.32. The city has never repaid or offered to repay that money. The other railway companies paid their due proportion of the cost of the improvement as before indicated. Such improvement made necessary the incurrence of considerable expense in constructing a bridge for appellant's track over Vaughn avenue. All the companies laid out their yards and constructed their depots and station facilities with reference to the streets and alleys, obstructed as aforesaid, having been abandoned as ways for public travel. The attitude of the city, indicated by its placing its own buildings in the street, was continued in various ways. In 1890 it built an addition to the fire hall in Fourth avenue. In 1892 it constructed therein a storage shed west of the hall. The buildings at this time occupied nearly the whole width of the avenue. In 1892 it built a hay shed at the rear of the fire hall in the center of the avenue. In 1894 it moved a building into the avenue, where it has since remained and been used as a street commissioner's office.

The vacation ordinance of 1887 was, June 26, 1888, in form repealed, but no personal notice thereof was ever given to the defendant's predecessor, nor was such predecessor distinctly notified that the city would insist upon restoring Fourth avenue to the public use where it was supposed to have been vacated or abandoned, till May, 1901. That notification was not followed up by any disturbance of appellant. On the contrary, in 1895, the city and the citizens of *Ashland* requested the railway companies, in view of the streets having been vacated or the companies having been permitted to use the same as part of their depot grounds in the manner before stated, to remove their pile bridges over

Vaughn avenue and replace them with steel structures. Defendant complied at an expense of $3,500. Since 1887 the railway companies have remained in undisturbed possession of the streets covered by the vacation proceedings, and during all that time have proceeded openly with the work of arranging tracks and other station facilities, expending in doing so the following sums: Defendant, about $30,000; the Chicago & Northwestern Railway Company, $50,000; the Wisconsin Central Railway Company, some $75,000. Part of such expense was incurred in the construction of an expensive stone depot, which entirely obstructs Third avenue. In the meantime Second avenue has been obstructed by a freight house, by the warehouse of the Armour Packing Company, and other structures. If it should now be held that defendant has no right to use Fourth avenue in any way inconsistent with the use thereof as a public street, it would be obliged to rearrange its entire station facilities, and suffer irreparable loss.

The foregoing shows that as early as 1887 appellant's predecessor and its associate railway companies, which included all the railway interests in one of the most important cities, as regards commerce, in the state, involving to a great extent investments of millions of dollars, and the people and governing authorities of such city evinced a desire that the station facilities of all of such railway companies should be located together within the corporate limits of such city, substantially as they were located, making necessary the interruption of the use of the streets now complained of. At the early date mentioned there was an occupancy of the streets in such a way as to plainly indicate that it was intended to be permanent, and to indicate to any fair-minded man that the conduct of the railway companies in that regard was grounded upon a supposed general consent thereto by all interested parties, public and private. From that time on till the commencement of this action, covering a period of some

thirteen years, there was not a moment that the city and every citizen thereof specially interested did not have a cause of action against appellant's predecessor and also against its associate railway companies on account of the encroachment on the streets mentioned. Yet no move was made to seriously challenge their right to continue such occupancy. Not only was no such move made during that long period, but throughout the whole time there were affirmative acts by the city, and assent, by not objecting, to acts of private parties in treating the streets in question as abandoned as regards the public use thereof, such conduct on the whole being inconsistent with any other reasonable theory than that the city recognized the right of the railway companies to maintain their station facilities as arranged. During that period the improvements by the railway companies, to enable them to properly perform their quasi-public duties, exceeded $100,000; and the value of property within the city so increased that to change the location of the yards and make new arrangements to properly exercise the railway franchises, would entail not only loss of most of the money expended in the old location, but a very large sum in addition.

How radically the decision in the former case in the trial court and that upon appeal, and the decision in this case in the trial court and this as well, failed to apply to the entire situation thus pictured the broad doctrine of equity, that in dealing with the subject of whether the public should be held to have lost a right by reason of its having been superseded by an overpowering equity the chancellor does not look merely to lapse of time or any particular circumstance by itself, but to all the circumstances bearing on the question, the full scope of the inquiry being this: In view of the whole situation what does right and justice require? (*Paine L. Co. v. Oshkosh,* 89 Wis. 449, 61 N. W. 1108), can best be made plain by showing by the findings in the two cases what the trial judges conceived were all the vital facts for equitable

cognizance. Here is a synopsis of the findings in the first case, so far as they affect the subject of equitable estoppel: First, in 1887 the railway corporations and the city of *Ashland* agreed that the latter would vacate specific parts of streets and alleys, including that part of Fourth avenue in controversy, and in consideration thereof the former would pay the expenses of certain improvements of Vaughn avenue. Second, in December, 1887, the city in form by ordinance performed its part of said agreement. Third, in 1888 the city repealed the vacation ordinance. Fourth, the defendant's predecessor, relying upon the vacation proceedings, expended large sums of money in the construction of its yards and in paying for the improvement of Vaughn avenue. Conclusion: The city of *Ashland* is estopped from claiming that the said portion of Vaughn avenue in controversy is a public street.

Thus it will be seen that the whole case was made to depend on whether the railway companies, relying upon the validity of the vacation proceedings, were induced to occupy a position from which they could not recede without irreparable loss. The general attitude of the city and the public for a period of more than ten years, indicating that the occupancy of the street by the railway companies was acquiesced in and regarded as permanent, and the expenditure by the railway companies of large sums of money, the expenditure extending over the whole period mentioned, without any attempt being made by the city or any private person interested to challenge the occupancy of the streets, were not taken notice of at all. As the case was decided, if the railway companies did not acquire an overpowering equity solely by reason of having acted on the faith of the vacation proceedings, they did not possess any such equity. It seems that argument is unnecessary to demonstrate that such a view excluded the most powerful factors in the case in building up an equitable right in favor of the railway companies. When the case

came here the judicial vision was not in the least broadened, as will clearly appear from what follows.

Speaking of the basis for the equitable estoppel claimed, as this court understood the matter, it was said:

"The alleged estoppel is based upon the finding that the city and the railroad companies entered into an agreement by which the city agreed to vacate the street, and the companies to pay for certain specified improvements in other streets." *Ashland v. C. & N. W. R. Co.* 105 Wis. 403, 80 N. W. 1103.

The court then said, in effect, that no estoppel could legitimately rest on such an agreement for the following reasons: First. The railway companies knew that the city did not possess power to make the agreement. Second. The railway companies knew or were bound to know that the vacation proceedings were *ultra vires* and void. Third. The railway companies knew or were bound to know that the vacation ordinance was repealed on June 26, 1888. Fourth. There is no evidence that the railway companies took any action under the vacation ordinance prior to the repeal. Fifth. Whatever was done by the railway companies was done in reliance upon the void contract to vacate, which does not constitute a colorable basis for an equitable estoppel. General conclusion, based on the decided propositions: It appears neither that the city abandoned its right to the street, nor was guilty of any delay, nor did any act upon which the defendant railway company or its predecessor had a right to rely. That is, as I understand it, that the city was not guilty of any such delay, nor did any such act, because the defendant was bound to know that the agreement of the city to vacate the streets, and the vacation proceedings, were void. In that not only did the court overlook the real basis in the evidence for an equitable estoppel, but wrongly assumed, it seems, that merely because the vacation proceedings were void they could not form the basis for an equitable estoppel.

There is ample authority for the position that an *ultra*

vires act, strictly so called, of a municipality, forms no legitimate basis for an equitable estoppel because of the presumption of law that every one knows the limitations upon corporate power. That does not apply to acts within corporate power, void because of some illegal manner of execution. Such acts are commonly spoken of as *ultra vires,* but they are not so within the restricted meaning of that term applicable to the rule to which the court referred. That meaning is, "beyond the capacity of the corporation to do at all." 27 Am. & Eng. Ency. of Law, 352, 353. When the corporation has power to act—it was conceded by the court the city of *Ashland* had power to vacate streets—but fails to exercise that power in a legal way, equities in favor of private parties may be based thereon. The difference between the two situations will be found on examination to be the key to the difference in results in cases where an equitable estoppel against a municipal corporation was asserted. In *Snyder v. Mt. Pulaski,* 176 Ill. 397, 52 N. E. 62, it was said that no equitable estoppel can arise from an act of municipal authorities without authority of law. In *Seeger v. Mueller,* 133 Ill. 86–95, 24 N. E. 513, the court said:

"No estoppel can ordinarily arise from the act of a municipal corporation or officer done in violation of or without authority of law. Every person is presumed to know the nature and extent of the powers of municipal officers, and therefore cannot be deemed to have been deceived or misled by acts done without legal authority."

It must be easily seen that the principle of those cases should not have been applied here, first, because the attempted vacation of the street was not an act beyond the scope of corporate power; and second, because the equitable estoppel was not dependent upon the vacation ordinance as a basis, but upon the general conduct of the city and all the circumstances whereby the railway companies finally came to the position from which they could not retire without irrep-

arable loss. The equitable right of the railway companies might be sustained and the vacation ordinance and its repeal left entirely out of view. Here is the broad principle governing the matter, as stated by the Illinois court and approved by this court in *Paine L. Co. v. Oshkosh,* 89 Wis. 449, 61 N. W. 1108:

"Where the public have long withheld the assertion of control over streets, and private parties have been, by the acts of those representing the public, induced to believe the streets abandoned by the public, and on the faith of that belief, and with the acquiescence of those representing the public, they have placed themselves, by making structures or improvements in the street, in a situation where they must suffer pecuniary loss if those representing the public be allowed afterwards to allege that the street was not abandoned, the doctrine of equitable estoppel may be applied." *Lee v. Mound Station,* 118 Ill. 304, 317, 8 N. E. 759.

It seems to me that the determination of the former case as if the equities of the railway company depended solely on whether they had any standing in a court of equity since their conduct was based on a void contract, is so clearly wrong that it should not stand in the way of a reconsideration of the whole subject upon this appeal.

The trial court in this case, guided by the decision upon the former appeal, very naturally overlooked everything bearing on the question of equitable estoppel except, first, whether the vacation proceedings were *ultra vires,* and second, whether any act was done by appellant on the faith of such vacation proceedings before the repealing ordinance. This court having said that the vacating ordinance was *ultra vires* and so could not be referred to as a basis for an equitable estoppel, the trial court of course felt bound to follow it. That of itself was fatal to appellant's position. There was but one other phase, as has been seen, which, within the limits of the former decision, could in any event cut any figure. That was whether appellant did anything or failed to do anything

in good faith relying upon the validity of the vacation ordinance before the repeal thereof. That the court very properly felt bound by the former decision to decide in favor of respondent.

My brethren, in endeavoring to meet one of my criticisms of the former decision, say:

"We did not declare that the attempted vacating of streets by a void ordinance might not be considered in association with other facts and circumstances, and the whole be held cogent enough to bring into operation an estoppel against the city. That we had no such intention is rendered plain by the very context of the opinion, pointing out that there was no clear and sufficient proof that the railway company had erected any structures or incurred any considerable expense in reliance upon that attempted vacation, they being chargeable with knowledge of its repeal."

I am unable to understand the former opinion that way, but whether the court's view be right or not it is manifest by the reasoning of my brethren that they understand that the court on the former occasion went no further than to assume, without deciding, that acts might have been done by the railway companies in good faith relying upon the validity of the vacation proceedings, which would have given the companies a standing in a court of equity, but that they did no such acts. My own view is that the effect of the former opinion is this: The vacation ordinance was void; therefore no equitable estoppel could be predicated thereon. However, if the void ordinance could form the basis for an equitable estoppel upon proof being made that the railway company changed its position in reliance thereon, there was no such proof in the record. Neither formerly, nor on the present occasion did the court give due weight to all the circumstances characterizing the occupancy of the street by the railway companies, its undisturbed character through a period of more than ten years, the positive acts of encouragement on the part of the city to continue occupancy by conducting the public affairs as if the

streets occupied by the companies were no longer public thoroughfares, the final creation of a situation, the growth of which could have been easily stopped at the outset before any considerable outlay had been made by the railway companies, which cannot be retired from without enormous loss.

I need not say more to make my position appear clear. If I were to view this case from the narrow standpoint of whether the appellant in good faith changed its position relying upon the validity of the vacating ordinance, either before or after the repeal thereof, my conclusion would be in harmony with that of my brethren. But looking at all the circumstances bearing upon appellant's right, it seems that one of the strongest cases is presented upon the record before us for the application of the doctrine of equitable estoppel that can be found in the books. As held in *Paine L. Co. v. Oshkosh,* the principal inquiry in all this class of cases is, In view of all the circumstances does justice require an equitable estoppel to be raised against the public?

CASSODAY, C. J. I concur in the opinion of my brother MARSHALL.

NATIONAL CASH REGISTER COMPANY, Plaintiff in error, vs. BONNEVILLE, Defendant in error.

September 10—September 29, 1903.

Payment: Accounts: Motions for direction of verdict: Waiver of jury trial: Replevin: Sufficiency of verdict.

1. If by express or tacit consent two parties agree to the entry upon a mutual account between them of a charge against one, and that one proceeds to make payments sufficient to cover that item and all preceding ones, it constitutes payment of that item, at least as against protest by any third person.
2. Although both parties move for the direction of a verdict they do not thereby waive the right to have the facts passed upon by the jury.

3. A verdict in replevin is not insufficient because it does not expressly determine the ownership of the property, if it finds the facts from which ownership results as matter of law.

ERROR to review a judgment of the circuit court for Taylor county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Action of replevin for a cash register sold by plaintiff to defendant at an agreed price of $200, upon which credit was allowed for the price of a former cash register, shipped to the defendant by the plaintiff at the request of one William Werder, the price whereof was supposed to have been sent by Werder to the plaintiff. The balance of $135 was to be paid in certain specified instalments, and the title to remain in the plaintiff until completed payment. Such sum was paid, as agreed. Plaintiff claimed that the allowance of credit for the former machine was made upon the representation of the defendant that the price of the same had been paid, which was alleged to be false. Defendant denied any such representation, and offered proof that he had paid the price thereof to Werder. The case was submitted to the jury, with instructions that they could find for the defendant only by finding that the defendant had paid the full price to the person entitled to receive the same. The jury found a verdict in favor of the defendant, upon which judgment was entered, to which the plaintiff sued out writ of error.

The cause was submitted for the plaintiff in error on the brief of *John B. Hagarty,* and for the defendant in error on that of *Textor & Cook.*

DODGE, J. The principal contention is that there was no evidence that defendant had paid the price of the first machine, closely associated with which is the claim that the evidence offered to establish that fact was inadmissible. That evidence consisted in defendant's own testimony that Werder, from whom he was purchasing goods and with whom he had an open account, ordered this machine to be sent to defendant

and charged it in the open account; that thereafter defendant went on paying upon this open account, which was increased by subsequent purchases, and had paid largely in excess of all that was charged thereon up to and including the charge for this original cash register. If it be assumed that Werder was the person to whom defendant was to make payment for this first machine (a fact which apparently was assumed by all parties upon the trial, and which is warranted by a recitation in the written contract, indicating that all parties understood that Werder, and not the defendant, was the person to pay plaintiff), we are of opinion that these contentions of the appellant must be overruled. If by express or tacit consent two parties agree to the entry upon a mutual account between them of a charge against one, and that one proceeds and makes payments in amounts sufficient to cover that item, together with all preceding ones, it constitutes payment of that item, at least as against protest by any third party. It is urged by the appellant that since defendant did not accept and retain the old machine, he did not owe for it, and therefore any payments which he made to Werder on account must be applied to other items in that account; but this is a contention which only the defendant himself could make. If he was willing that as between him and Werder this first machine be charged to him, the appellant cannot be heard to object. Such testimony, then, being admissible, of course tended to prove the fact of payment, and if believed by the jury, warranted them in finding that the defendant's representation that he had paid the purchase price was true.

In this connection it is urged that, inasmuch as both plaintiff and defendant moved for the direction of a verdict, the parties waived a decision by the jury upon all questions of fact, and consented that the court should pass upon them; whence it is claimed that the court should have considered where was the preponderance of the evidence upon this and other questions, and decided the facts without submission to

the jury. That rule of practice, which maintains in New York, has been entirely repudiated in this state some years since; long enough, it would seem, for the profession to have ascertained the fact, and to refrain from repeated citation of the New York authorities on the subject. *Thompson v. Brennan,* 104 Wis. 564, 80 N. W. 947.

A criticism of the charge based upon the assumption that the court assumed that the first cash register was sent to the defendant by Werder is obviously unfounded. The statement made by the court is perhaps a trifle ambiguous, but clearly, in the light of the record, was that the purchase price was claimed to have been sent to the plaintiff by Werder; which is a correct exposition of the recitation of the contract. In any event, it is wholly immaterial, and could have worked no prejudice, for in immediate connection the court points out that the register itself was shipped direct to the defendant by the plaintiff.

Further complaint is made that the jury did not, by their verdict, expressly determine the ownership of the replevied register. The verdict was to the effect, among other things, that the defendant was entitled to possession, and that the plaintiff unjustly took and detained the same. The jury were instructed that they could reach this verdict only by finding that defendant had fully paid for the register, so that they must be presumed to have found this fact; which, being found, left no question of fact as to the title. Confessedly, if the property was paid for, it belonged to the defendant. If it was not paid for, the plaintiff had a special interest therein. There was no occasion for the jury to go further than to find the facts, to which the court might apply the law.

We find no other assignments of error worthy of discussion.

By the Court.—Judgment affirmed.

WILKINSON, Respondent, vs. UNITED STATES FIDELITY & GUARANTY COMPANY, Appellant.

September 10—September 29, 1903.

Garnishment: Release: Undertaking to pay judgment: Pleading: Payment: Fraud: Estoppel to deny indebtedness of garnishee.

1. In an action upon an undertaking to pay a judgment an answer alleging that defendant had no knowledge or information sufficient to form a belief as to whether the judgment or any part thereof has been paid or not, did not entitle defendant to the benefits of a plea of payment; and plaintiff was not bound to prove that the judgment had not been paid.
2. In an action upon an undertaking to pay a judgment it is no defense that the undertaking was procured by fraud of the judgment debtor, if the plaintiff had no knowledge and was not chargeable with notice of the fraud.
3. Where the principal defendant procures the release of a garnishment by the giving of an undertaking, under sec. 2771, Stats. 1898, to pay the judgment which may be recovered, both such defendant and his sureties are estopped, in an action on the undertaking, to deny that the garnishee was indebted to him.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The respondent brought action against one W. F. Pleas, garnishing W. H. Gilbert. W. F. Pleas, as defendant in the action, applied to the court for an order for the release of the garnishment, under sec. 2771, Stats. 1898. The court ordered that an undertaking might be filed with the clerk to the effect that the sureties would pay on demand to the respondent, the amount of the judgment that might be recovered against W. F. Pleas, with all costs, not exceeding the sum of $4,000. The judgment debtor, W. F. Pleas, procured the undertaking in question from appellant, whereby it undertook to pay respondent on demand the amount of the judgment, with all costs that might be recovered against W. F. Pleas, not exceeding the sum of $4,000. Respondent recovered judgment against W. F. Pleas in the sum of $9,440.33,

and on the refusal of appellant to pay the $4,000 this action was brought to collect the amount of the undertaking.

Appellant alleges that W. F. Pleas obtained the undertaking by falsely representing his financial standing; that it was filed without its knowledge or consent, and was without consideration; and that it was not liable because the garnishee was not indebted to and did not have property under his control belonging to W. F. Pleas when the garnishment process was served.

Judgment was ordered upon the pleadings in the sum of $4,000, with costs of $100.32. The appeal is from this judgment.

For the appellant there was a brief by *Ben. S. Smith,* attorney, and *R. Sleight,* of counsel, and oral argument by *Mr. Smith.* They contended, *inter alia,* that the complaint, alleging that no part of the judgment has been paid, is susceptible to a general denial under which proof of payment is admissible. Pomeroy, Remedies (2d ed.) 712; *Frisch v. Caler,* 21 Cal. 71; *Brown v. Orr,* 29 Cal. 120. Plaintiff was therefore not entitled to judgment until he proved that the judgment had not been paid.

For the respondent there was a brief by *Tomkins, Tomkins & Garvin,* and oral argument by *W. M. Tomkins.*

SIEBECKER, J. The appellant asserts that the court erred in not requiring respondent to prove that the original judgment remained unpaid. The answer admits that judgment was recovered by the respondent in the original suit, wherein the undertaking sued on in this action was given as alleged in the complaint, but alleges no knowledge or information sufficient to form a belief "whether the same or any part thereof has been paid or not." The allegation of the answer is not sufficient to entitle appellant to the benefits of the plea of payment; it amounts to no more than a general denial, under which proof of payment cannot be received. *Martin v. Pugh,*

23 Wis. 184; *Hawes v. Woolcock,* 30 Wis. 213; *Rossiter v. Schultz,* 62 Wis. 655, 22 N. W. 839; *Meating v. Tigerton L. Co.* 113 Wis. 379, 89 N. W. 152.

Appellant alleges fraud on the part of the defendant in procuring the undertaking sued on, but makes no claim that respondent in any way participated in perpetrating such alleged fraud. We are unable to perceive how respondent can be affected in his legal right by fraudulent conduct of the defendant in procuring a dissolution of the garnishment proceeding of which he had no notice or knowledge to put him on inquiry as to the alleged fraudulent conduct. It was incumbent on appellant to protect itself from any deception by the defendant, and if it was induced to give the undertaking by his fraudulent conduct then it must suffer the injury; for the law demands that he who deals with and trusts another, and thereby suffers an injury, should be the loser rather than a stranger.

It is further contended that it was error on the part of the trial court not to permit the defendant to show that the garnishee did not owe the defendant, judgment debtor, anything at the time the undertaking was given. Sec. 2771, Stats. 1898, provides that

"The defendant may, at any time after the commencement of the action and before judgment, file with the clerk of the court an undertaking executed by at least two sureties, . . . to the effect that they will, on demand, pay to the plaintiff the amount of the judgment with all costs that may be recovered against such defendant in the action," etc., and that "thereafter the garnishee shall be discharged and the garnishment proceeding shall be discontinued," etc.

When the defendant in the original action elected to give the undertaking under this statute, which supersedes the garnishment proceeding, he waived all right to an investigation of any issue in that proceeding, and is thereby estopped from a trial of the question whether anything was due at the time

of the garnishment. *Thoen v. Harnstrom,* 98 Wis. 231, 73 N. W. 1011; *Greengard v. Fretz,* 64 Minn. 10, 65 N. W. 949.

The purpose of the statute is to afford the defendant an opportunity to release his property in the hands of the garnishee, and substitute an undertaking, with sureties, in place of the property impounded by the proceeding. This proceeding being discontinued, and the sureties having undertaken to pay in place of the judgment debtor, they must be held to stand in the same position, and be estopped from denying that the garnishee was in any way liable to the defendant. The statute is like that allowing bonds to be given to release the property where attachments have issued, which are conditioned for the payment of judgments obtained against defendants. In such cases the liability of the surety becomes absolute when judgment is rendered against the defendant for whose benefit the bond was executed. *Dierolf v. Winterfield,* 24 Wis. 143; *Billingsley v. Harris,* 79 Wis. 103, 48 N. W. 108.

By the Court.—The judgment of the circuit court is affirmed.

GRANT, Appellant, vs. KEYSTONE LUMBER COMPANY, Respondent.

September 11—September 29, 1903.

Master and servant: Personal injury: Contributory negligence: Assumption of risk: Negligence of fellow-servant: Defective appliances: Proximate cause: Court and jury.

1. Plaintiff, while working as head sawyer in a sawmill, was struck and injured by a strip of lumber which, while passing between the saws of an edger, was caught by a saw and thrown back. Upon the evidence—tending to show that his duties did not require him to, and he never did, have anything to do with the operation of the edger or with the men running it; that when at his work, and at the time of the injury, he was fifty-seven feet away from the edger, with his back to it; that in

passing to and from his work he went within twenty-five feet of the edger, but did not examine it, and did not know there were any appliances to keep boards from coming back; and that he never saw or knew of boards coming back from it before he was hurt—it is *held* that a verdict for defendant should not have been directed on the ground that plaintiff was guilty of contributory negligence or had assumed the risk.

2. The plaintiff in such case, whose duties as head sawyer consisted in operating a circular saw for sawing logs into lumber, and the men operating the machine for edging the lumber, were fellow-servants, being employed by the same master, under the same control, and performing services for the same general purpose.

3. Upon the evidence—tending to show that the edger was defective and out of repair in particulars affecting the likelihood of lumber being caught and thrown back—it is *held* that the questions whether or not plaintiff's injury was caused wholly by the negligence of his fellow-servants operating the edger, and whether or not the negligence of defendant (the mill owner) in respect to the machine was the proximate cause of the injury, were questions for the jury.

4. An employer who has negligently permitted the use of a machine in doing his work, which, by reason of its defects, is unnecessarily dangerous to his employees, is liable for an injury resulting from its use to an employee who was not himself negligent, even though a co-employee was guilty of negligence in managing the machine, and if it had been carefully handled the accident would not have occurred.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action to recover damages sustained by the plaintiff while in the employ of the defendant as head sawyer in running a circular saw and by being struck by a board thrown against him by an edger situated fifty-seven feet from where he stood at the time he was injured. Issue being joined and trial had, the court, at the close of the trial, directed a verdict in favor of the defendant. From the judgment entered thereon the plaintiff appeals.

The facts essential to appreciate the questions involved are to the effect that the north end of the defendant's mill extends north to the lake. The plaintiff was a married man,

thirty-nine years of age, and had worked as head sawyer in the mill for eight seasons, and in and about the mill much longer. The circular saw at which he was at work at the time was situated in the northwest corner of the mill, and about forty feet from the north end thereof. That circular saw was used in sawing up logs into lumber, cants, and slabs. As head sawyer the plaintiff's duties consisted in handling levers which controlled the action of the carriage and circular saw. Immediately to the east side and to the rear of the circular saw, and about two feet above the level of the mill floor, was a table in which were a number of live rollers upon which were placed the cants which were thrown from the table by skids—called "kickers"—onto other skids and were taken from there to the gang saws and manufactured into lumber, and the lumber, boards, and slabs were carried along on such tables south to the front of the mill. The plaintiff's duty required him to stand behind and to the right of the circular saw carriage, with his back toward the double gang edger located at or near the center of the mill and fifty-seven feet southerly from where the plaintiff stood at the time with his back toward the edger. The gang edger consisted of three parts—a table in front, about 6x10 feet on the surface, and a table in the rear, about 6x8 feet on the surface, and the gang edger between the two tables, wherein are located the saws and other gearing to do the edging. The tables are about two feet above the floor of the mill, and they each have three rollers over which the lumber is pushed, and they are both placed close against the edger in the center. This gang edger contains six saws—three on the right side and three on the left side—with a space of about forty inches between them when the saws are as close together as they can be placed. Each saw is sixteen inches in diameter. The two outside saws are so attached to the arbor that they do not move sideways, but the four inside saws are so connected to a lever and are so arranged that they can be moved sideways on the arbor. Each

saw is fastened to a collar around the arbor which propels the saws, and they run, when in proper condition, true and perpendicular. The levers connected with those four inside saws extend to the front end of the front table, and are handled and manipulated by three edger men. These levers and saws are so arranged that the boards and lumber put through the edger can be trimmed or edged to any width desired, or passed through without trimming or coming in contact with any saw. This gang edger is sixty-five inches wide, and has one feed roller in front and two feed rollers in the rear—one directly in front of the other—each of which is four inches in diameter. There are two press rollers in the rear, six and one half inches in diameter, each being twenty-eight and one half inches long, which, with an intervening space of five and one half inches, extend nearly the entire width of the edger. There is a space of five and one half inches between each of the press rollers, and those press rollers are so arranged that they can be raised with levers that have ropes attached thereto which can be pulled down by the edger men, and in doing so will raise the press roller to any height desired. The feed rollers each contain spurs which are calculated to assist in pushing the lumber through the edger. In front of the saws were arranged twelve teeth—each about fourteen inches long, to prevent pieces of lumber and edgings from being thrown back by the saws. These teeth are fastened to a rod about one and one half inches in diameter situated above the saws and to the front—being almost directly over the front feed roller, and are supposed to be kept in place by pins placed through the rod, one on each side of each tooth. These teeth extend down toward the saws at an angle of about twenty-five degrees, to within about half an inch of the bed or level of the edger. The distances between these teeth were from four and one fourth to nine and one half inches, and they hung loose, so that the points of the teeth moved sideways, causing the distance between the teeth to change. When the mill

is in operation, the saws in the gang edger revolve very rapidly. All lumber coming from the gang saws as well as that coming from the circular saw, was put through the gang edger.

At the time in question a bunch of lumber coming from the gang saws, which needed no trimming nor edging, was being put through between the saws of the gang edger without any intention of having the same come in contact with the saw on either side. One of the four-inch strips became separated from the bunch lying loose on the rollers, and swung around so that the saw struck it and threw it back and hit the plaintiff and badly injured him.

Victor T. Pierrelee, for the appellant.

George F. Merrill, for the respondent.

Cassoday, C. J. It is said that the trial court directed the verdict in favor of the defendant on the ground that it appears from the undisputed evidence that the plaintiff was guilty of contributory negligence or assumed the risk. The accident occurred about 2 o'clock in the afternoon of April 30, 1902. There is evidence tending to prove that the duties of the plaintiff as such head sawyer did not require him to have anything to do with the operation of the gang edger; that he never worked upon that edger, and had nothing to do with the men running that edger; that his work was different work, and was independent and away from the edger; that when at work his back was toward the edger and fifty-seven feet away from it; that he knew nothing about the construction of the edger; that he never looked at the edger, particularly, before he was hurt; that he never saw or knew of pieces of lumber or things coming back from the edger before he was hurt; that in going to and coming from his work he went within twenty-five feet of the edger, and could see the frame and edger when it worked, but never examined it; that he did not know that there were any appliances to keep boards or other

things from coming back; that he did not know that the fingers would spread apart, nor how long they were, nor how long they had been out of order. For the purposes of this appeal we must assume such evidence to be true. If it is true, there is no ground for holding that the plaintiff was guilty of contributory negligence, nor that he assumed the risk. Of course, contributory negligence is a want of ordinary care on the part of the party injured which contributes to produce the injury. There is nothing to indicate that the plaintiff failed to exercise such care. "It is a general rule that, where unusual dangers are known to the employee, and he voluntarily assumes them, if he is thereby injured he cannot recover, because of his contributory fault, even though the master at the same time is guilty of negligence which, without such assumption of risk, would have rendered him liable." *Powell v. Ashland I. & S. Co.* 98 Wis. 36, 73 N. W. 573. Here it does not appear from the undisputed evidence that the plaintiff knew or ought to have known of the danger to which he was thus exposed. "An employee cannot be said, as a matter of law, to have assumed the risk incident to his employment, unless such assumption is shown by undisputed evidence or is so clearly proven that no reasonable inference can be drawn to the contrary." *Revolinsky v. Adams Coal Co.* 118 Wis. 324, 95 N. W. 122.

2. Counsel for the defendant insists that the plaintiff's injury was the result of the negligence of a co-employee of the plaintiff, and hence that the plaintiff cannot recover. The general rule deducible from the adjudications of this and other courts, as stated by the late Chief Justice COLE, is that:

"To constitute fellow-servants, it is not necessary that the negligent workman causing the injury and the one injured should both be engaged in the very same particular work. It is sufficient if they are employed by the same master, under the same control, and performing duties and services for the same general purpose." *Toner v. C., M. & St. P. R. Co.* 69 Wis. 198, 31 N. W. 104, 33 N. W. 433, and numerous cases there cited.

In a late case it is said that fellow-servants are defined as "those engaged in the same common pursuit, under the same general control"—as "persons employed in the same general business by a common employer;" that the question is not "controlled by the fact that different parts of the work necessary to the general enterprise are placed in hands of employees remote from each other, and receiving immediate command from different superiors, or, indeed, one from the other." *Okonski v. Pennsylvania & O. F. Co.* 114 Wis. 453, 90 N. W. 429, citing numerous cases. We must hold that the edger men were fellow-servants with the plaintiff.

The question, therefore, is whether the plaintiff was injured solely by reason of the improper or negligent manner in which the edger men put the boards through between the gang saws. That is necessarily a question of fact. A witness on behalf of the plaintiff testified to the effect that an armful of strips, from four to six inches wide, which needed no edging, were, at the time of the accident, being merely shoved by the edger men through and over the rollers in the space between the gang saws, which were forty inches apart; that the top strip, which was white pine, fourteen feet long, an inch thick, and four inches wide, swung and jerked on the saw, and it came back and swung half across, and when it started to go it was pointed toward the gang saws; but it swung off—half way across—so that it went over and struck the plaintiff; that he thought it was caused by the third finger being badly bent—crooked—because a strip got in between, and there was nothing to hold it; that when there is no finger catching the board it has got to go back; that the fingers play sideways, and lift up when boards are put through; that he was not sure how much of the board had gone in the roller when it began to swing, but he should say about a foot. The edger man who was so putting through the strips at the time testified quite similarly, and also to the effect that there were some spikes in the feed rollers that carried some of these four-inch strips out, and so this board was only about two feet be-

hind the saw when it swung; that it was not heavy enough to go through; that there were no press rollers on it, so when the saw got hold of it it went onto the saw to the side, and he was trying to get the pile through when he saw the board lay there, and he then pulled on the east press roller and shoved on it, but could not make it go, and then he got hold of the long rope, and then the board came before he pulled on it; that the board that went back was on the east side, and laid clear down on the roller; that the other boards were probably ten inches from this one; that he never counted the fingers or teeth on the shaft, and could not tell how many there were, nor how far they were apart at the top; that they were from four to six inches apart at the bottom, and they could be spread an inch or so—should say seven or eight inches, but he did not think nine inches; that he did not think there was a finger on the board when it went back; that the fingers were for holding the boards from coming back; that he did not know how the board got by the fingers, but supposed it went between them; that, had a finger gone onto the board, it certainly would have held it, and one would have been on the board if the fingers had not been more than three or four inches apart. There was other testimony tending to prove that at the time of the injury some of the fingers on the edger were gone from the left-hand side; that the fingers on the edger were loose and would spread out; that the fingers had been out quite a while—because they were old and rusted and broken off close to the shaft, the breaks being old; that the fingers would spread—one would spread out or bend about nine inches; that the crooked finger caused the strip to come back; that the edger had been in the same condition for some time prior to the accident; that the fingers should not be more than four inches apart; that the fingers in question were very old; that most edgers now have no fingers, but rollers instead; that fingers, properly made, are a complete protection against lumber coming back; that they ought not to be more than two

inches apart; that the saw would shake, because it was worn; that the saws were old, did not run true, and would move, and be wider sometimes than others. In view of such evidence, we cannot say, as a matter of law, from the undisputed evidence, that the injury to the plaintiff was caused wholly by the improper or negligent conduct of the edger men. *Craven v. Smith,* 89 Wis. 119, 61 N. W. 317.

3. Assuming that the conduct of the edger men was improper or negligent, still the question is presented whether the negligence of the defendant in furnishing defective machinery concurred in producing the injury. It was held by this court several years ago, that:

"An employer who has negligently permitted the use of a machine in doing his work, which, by reason of its defects, is unnecessarily dangerous to his employees, is liable for an injury resulting from its use to an employee who was not himself negligent, even though a co-employee was guilty of negligence in managing the machine, and if it had been carefully handled the accident would not have occurred." *Sherman v. Menominee R. L. Co.* 72 Wis. 122, 128, 39 N. W. 365, and cases there cited.

That case is quite similar in its facts to the case at bar. In that case the plaintiff was injured by a plank thrown by an edger, and the court directed a verdict in favor of the defendant, and one of the defenses was that the injury was caused by the negligence of a co-employee. In a later case it was held that: "Where the injury to a servant is caused by the negligence of the master and that of a fellow-servant together, the master is liable therefor." *Cowan v. C., M. & St. P. R. Co.* 80 Wis. 284, 291, 50 N. W. 180. See *Jones v. Florence M. Co.* 66 Wis. 268, 28 N. W. 207. The reason for the rule is that the master is bound to furnish his servants with reasonably safe machinery and appliances with which to work, and a reasonably safe place for doing his work; and, if he fails to do so, he cannot escape liability by delegating such duty to one who in other respects may be a fellow-servant of

the person injured. *Brabbits v. C. & N. W. R. Co.* 38 Wis. 289; *Wedgwood v. C. & N. W. R. Co.* 44 Wis. 44, 41 Wis. 478; *Bessex v. C. & N. W. R. Co.* 45 Wis. 477; *Schultz v. C., M. & St. P. R. Co.* 48 Wis. 375, 4 N. W. 399; *Cadden v. Am. S. B. Co.* 88 Wis. 409, 60 N. W. 800; *Renne v. U. S. L. Co.* 107 Wis. 312, 83 N. W. 473; *Okonski v. Pennsylvania & O. F. Co.* 114 Wis. 453, 90 N. W. 429. As indicated, there is evidence in the case at bar tending to prove that the gang edger was defective and out of repair in the particulars which have been mentioned. If such defect and want of repair was, by reason of the defendant's negligence, the proximate cause of the plaintiff's injury, then the defendant cannot escape liability by the mere fact that the negligence of the edgermen concurred in causing the injury.

4. Assuming that the gang edger was defective and out of repair in the particulars mentioned, the question recurs whether the defendant was negligent in respect to the same, and, if so, whether such negligence was the proximate cause of the plaintiff's injury. The essential elements of proximate cause have been defined so often and so recently as not to require repetition. *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279, 72 N. W. 735; *Maitland v. Gilbert P. Co.* 97 Wis. 476, 487, 72 N. W. 1124; *McFarlane v. Sullivan,* 99 Wis. 361, 363, 364, 74 N. W. 559, 75 N. W. 71; *Hudson v. N. P. R. Co.* 107 Wis. 620, 624, 83 N. W. 769. The important question is whether the injury to the plaintiff was the natural and probable consequence of the negligence of the defendant, and whether an injury to any person ought to have been foreseen in the light of attending circumstances by persons of ordinary intelligence and prudence. We are constrained to hold that the evidence was sufficient to take the case to the jury on the questions suggested.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

DUNBAR, Respondent, vs. LINDSAY, Appellant.

September 11—September 29, 1903.

Tax titles: Void deed: Failure to name purchaser: Ejectment by original owner: Limitations: Possession of land: Pleading.

1. A tax deed reciting in one place that the lands were sold to the grantee, and in another that the certificates were assigned to him, fails to state the name of the purchaser at the tax sale, and is void on its face.
2. Under sec. 1189*a*, Stats. 1898, as amended by sec. 21, ch. 351, Laws of 1899, the limitation therein prescribed for actions of ejectment as to lands conveyed by tax deed void on its face, is not applicable unless the original owner or those claiming under him has failed to pay or redeem all the taxes levied upon such lands after those for the nonpayment of which the deed was issued, up to the time of the recording of the deed.
3. Where in ejectment for land sold for taxes the complaint alleges that defendant is in possession of the premises and the answer states that defendant has been in undisputed and continuous possession since the recording of his tax deed, evidence that the lands were at all times vacant and unoccupied was inadmissible against objection.
4. Ejectment may be maintained by the original owner against one claiming under a void tax deed, although the land is vacant and the claimant has not had actual possession. *Cutler v. Hurlbut*, 29 Wis. 152, explained.

APPEAL from a judgment of the circuit court for Vilas county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

This is an action of ejectment. The complaint was in the usual form. The answer denied plaintiff's ownership of the land in question, and also any unlawful holding thereof by the defendant. The answer further set up ownership by the defendant by virtue of a tax deed executed and recorded May 23, 1898, and alleged that more than three years had elapsed since the recording of the deed before the commencement of this action. The answer also alleged payment of taxes by the defendant for the years 1896 to 1901, inclusive, and that the

defendant had been in undisputed and continuous possession of the property in question since the recording of the tax deed.

Upon the trial before a jury the plaintiff proved record title in himself and rested. Thereupon the defendant offered in evidence a tax deed describing the property in question, a copy of which is as follows:

"To all to whom these presents shall come, greeting: Whereas, William Lindsay of Milwaukee, Wisconsin, has deposited in the office of the county clerk of the county of Vilas, in the state of Wisconsin, seven certificates of the county treasurer of the said county, whereby it appears, as the fact is, that the following described piece or parcel of land lying and being situated in the county of Vilas, to wit [description of lands], were, for the nonpayment of taxes, sold by the county treasurer of said county at public auction at his office in Eagle River, in the county of Vilas, on the 21st day of May, in the year of our Lord one thousand eight hundred and ninety-five, to the said William Lindsay for the sum of $45.83 in the whole, which sum was the amount of taxes assessed and due and unpaid on such tract of land, together with the costs and charges of such sale due therewith at the time of making such sale, the whole of which sum of money has been paid by the aforesaid purchaser, and whereas, it further appears, as the fact is, that the owners or claimants of said lands have not redeemed from said sale the lands which were sold as aforesaid and said lands are now unredeemed from such sale, whereby said described lands have become forfeited and the said purchaser or his assigns are entitled to a conveyance thereof, and whereas, it appears, as the fact is, that the aforesaid certificates have been duly assigned by the said ——— to the said Wm. Lindsay: Now, therefore, know all men by these presents, that the county of Vilas in said state and the state of Wisconsin, in consideration of the said money aforesaid and the premises and in conformity to law, hath given and hereby doth give, grant and convey the said tracts of land above described, together with the hereditaments and appurtenances, to the said Wm. Lindsay, and to his heirs and assigns, to their sole use and benefit forever.

"In testimony whereof, I, John Radcliff, deputy county clerk of the said county of Vilas, have executed this deed pursuant to and in virtue of the authority in me vested by the statutes of the state of Wisconsin, and for and on behalf of the said state and county of Vilas aforesaid, and have hereunto subscribed my name officially and affixed the seal of the said Vilas county at Eagle River in said county of Vilas this 23d day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

"[Signed] B. F. HAMMOND,
"County Clerk of Vilas County, Wis.
"[County Seal.] By JOHN RADCLIFF, Deputy.
"Done in presence of
"D. E. RIORDAN,
"GEORGE E. O'CONNOR."

Acknowledged and duly recorded May 23, 1898.

The defendant also proved the payment of taxes upon the land for a number of years, and offered other evidence, which is not material to the questions raised upon this appeal. At the close of the evidence the circuit judge directed the jury to return a verdict in favor of the plaintiff, and afterwards made an order requiring the plaintiff to deposit in court the amount of taxes paid by the defendant, with interest, which having been done, judgment was entered in favor of the plaintiff, with costs, and from this judgment the defendant appeals.

J. E. Wildish, for the appellant.

A. W. Sanborn, for the respondent.

WINSLOW, J. The circuit judge rightly held the defendant's tax deed void on its face. By one recital the tax deed declares that the lands were sold to the defendant, and by another recital that the certificates were assigned to the defendant. Thus it appears that it cannot be ascertained from the face of the deed to whom the lands were sold; in other words, it fails to state the name of the purchaser at the tax sale.

This defect has always been held to render the deed void. *North v. Wendell,* 22 Wis. 431; *Eaton v. Lyman,* 33 Wis. 34; *Hunt v. Stinson,* 101 Wis. 556, 77 N. W. 901.

The appellant claims that if the tax deed be void the action was barred by sec. 1189*a,* Stats. 1898, as amended by sec. 21, ch. 351, Laws of 1899. This claim, however, cannot prevail, because it appears that the respondent (the original owner) on the 27th day of November, 1899, duly redeemed the lands in question from the taxes for the years 1896 and 1897; hence, under the proviso in the seetion cited, it does not apply.

Another claim was made by appellant for the first time in this court, namely, that if the tax deed be void on its face it did not confer constructive possession upon the tax title claimant; that the evidence showed that the lands were at all times vacant and unoccupied, and hence that ejectment could not be maintained against the tax title claimant, because he had never been either in actual or constructive possession of the premises. In support of this contention *Cutler v. Hurlbut,* 29 Wis. 152, is relied upon. There are at least two sufficient answers to this contention: *First.* It is alleged in the complaint that the defendant is in possession of the premises, and the answer states that the defendant has been in undisputed and continuous possession since the recording of his tax deed, and has made improvements thereon. Thus the fact of defendant's actual possession is established by the pleadings, which have never been amended. The evidence showing that the lands were vacant was all given under the plaintiff's objection, and was clearly inadmissible to controvert a fact which stood admitted by the pleadings. *Second.* The case of *Cutler v. Hurlbut* does not hold that ejectment may not be maintained by the original owner against a claimant under a void tax deed where the lands are vacant, but rather the reverse. That case was an action of ejectment by the original owner against a tax title claimant whose deed

omitted the words "as the fact is" in the various recitals. The trial court directed a verdict for the defendant, and refused to instruct as requested by the plaintiff, to the effect that if neither the grantee nor his assigns entered into actual possession of the premises within three years after the tax deed was recorded, and had not been in actual possession for ten years before the commencement of the action, the verdict must be for the plaintiff. Upon appeal to this court there was a division of opinion as to the rights of the parties under the deed. All of the justices were of opinion that if the tax deed was void the instruction refused should have been given. Justice LYON was of opinion that the tax deed was valid, and hence the verdict was properly directed for the defendant. Chief Justice DIXON and Justice COLE were of opinion that the tax deed was void, but the chief justice thought the judgment should be affirmed, because the bill of exceptions did not purport to contain all of the evidence, and hence no affirmative error was shown in the order directing a verdict. Justice COLE dissented from the judgment, being evidently of the opinion that the case should be reversed for failure to give the instruction mentioned above. Thus it is evident that upon the point now raised the court in effect held that ejectment could be maintained against a tax title claimant under a void tax deed who had not had actual possession. We see no reason to change the rule there impliedly, if not expressly, adopted.

By the Court.—Judgment affirmed.

CITY OF WAUSAU, Respondent, vs. HEIDEMAN, Appellant.

September 11—September 29, 1903.

Municipal ordinances: Transient dealers: Licenses.

1. A municipal ordinance providing that "no transient merchant, trader, or dealer who shall bring into the city" any goods "for the purpose of selling the same from house to house, . . . shall be permitted to sell or expose for sale, barter or exchange by sample or otherwise at retail, or to customers, any such goods," etc., without first having obtained a license therefor, is not applicable to a traveling agent for a mercantile establishment located in another city who carries with him no goods for sale but merely solicits orders by sample, to be filled, if accepted, out of the stock of his principal in the other city and sent to the purchaser by the ordinary methods of transportation.
2. A "transient merchant, trader, or dealer," within the meaning of such an ordinance, is one who goes about taking with him the goods which he offers for sale or in which he deals or trades,—not one who, as agent, merely solicits orders for goods for his principal, whether by sample or otherwise.

APPEAL from a judgment of the circuit court for Marathon county: W. C. SILVERTHORN, Circuit Judge. *Reversed.*

Action to recover $125 said to be due from defendant under an ordinance, by reason of defendant, as a transient merchant, trader or dealer, not intending to permanently locate in the plaintiff city, coming into the same and exposing therein for sale by sample, goods, wares and merchandise, notions and articles of trade, soliciting and taking orders therefor, traveling, in so doing, from house to house and from place to place during a period of five days, and thereafter executing the orders obtained. The vital part of the ordinance, reading into it such parts of ch. 341, Laws of 1901, to which it refers, as are necessary to a full understanding thereof, is this:

"No transient merchant, trader or dealer, who shall bring into the city of *Wausau* any article or articles of trade, goods,

wares or merchandise, or notions other than such as are excepted," etc., "for the purpose of selling the same from house to house, and who does not intend to become a permanent merchant, trader or dealer in said city, shall be permitted to sell or expose for sale, barter or exchange by sample or otherwise at retail, or to customers, any such goods, wares, merchandise, notions or articles of trade, within the city of *Wausau,* without first having obtained a license therefor."

A method was prescribed for obtaining a license, the fee therefor being fixed at $25 per day.

The cause was tried by the court. The undisputed evidence was to the effect that defendant, as agent for the T. A. Chapman Company—a corporation conducting a mercantile establishment, permanently located in the city of Milwaukee, and employing traveling agents to solicit orders for merchandise to be filled out of its stock in said city, defendant being one of them,—visited *Wausau* in the customary way of conducting the business of his principal, and there traveled from house to house taking orders for goods by samples, all orders being subject to acceptance or rejection by the principal at its place of business in Milwaukee, and in case of acceptance the goods to be delivered by the ordinary methods of transportation of such articles, from such city to the city of *Wausau,* payment for the goods in all cases to be made by the customers direct to the T. A. Chapman Company at Milwaukee. Defendant had no interest whatever in the business conducted by him, except that of a mere employee as aforesaid. He did not deem himself within the ordinance referred to, and therefore did not apply for a license or pay any license fees.

The court found that defendant was a transient trader or dealer within the meaning of the ordinance; that he exposed for sale by sample goods, wares, merchandise, notions and articles of trade, traveling from house to house in doing so, in the city of *Wausau;* that he took orders for goods to be subsequently delivered thereon, and thereby became a tran-

sient dealer or trader; that the business done by defendant did not come within any of the exceptions mentioned in the law, and that as he did not obtain any license for doing the business, or pay any license fee, he was liable to the plaintiff for the fee imposed by its ordinance, of $25 per day, or $125, he having been engaged in his business in the city for five days. Judgment was rendered accordingly.

For the appellant there was a brief by *Edwin S. Mack,* and oral argument by *Mr. Mack* and *Mr. George P. Miller.*

M. B. Rosenberry, attorney, and *M. A. Hurley,* of counsel, for the respondent.

MARSHALL, J. It will be observed that the judgment is based merely on the fact that appellant, doing the business of an ordinary traveling agent for a mercantile establishment located in the city of Milwaukee, personally solicited orders for goods by sample, to be filled, if accepted, out of the stock of his principal in such city; and that in so doing he traveled from house to house in the respondent city. It was not claimed in the complaint, established by evidence, or found by the court, that appellant brought into such city any other goods than the samples he carried about with him as a mere traveling agent, or that he offered for sale or sold any of such samples or any goods by sample or otherwise. That essential of the ordinance was left wholly uncovered. In that situation it seems that the case of respondent clearly failed to satisfy the calls of the ordinance. Being a penal law, upon familiar principles it must be strictly construed against the respondent if open to construction at all. The learned trial court obviously supposed it was so open, for certainly the mere taking of orders for goods in *Wausau,* to be filled out of a mercantile stock in Milwaukee, exhibiting samples in so doing, is not within the literal sense of the words, "bring into the city of *Wausau* any article or articles of trade," etc., and "sell or expose for sale, barter or exchange by sample or other-

wise, . . . such goods," etc. Such literal sense plainly covers only selling of goods by sample or otherwise out of a stock of goods brought into the city by the seller and presently therein. To read into the words used the idea that they were aimed at mere traveling men, or agents, taking orders for goods as appellant did, would require not only construction, but construction of a violent character,—one hardly warranted in any case; certainly not in one involving the rights of a person charged under a penal statute.

It is claimed by appellant that one merely taking orders for goods by sample, as in this case, is not a merchant, dealer or trader; that such terms include only persons who buy and sell goods on their own account. There is much force in that proposition. The ordinary meaning of the term "transient dealer or trader" is one who goes from place to place carrying goods for the purpose of selling, trading or dealing in the same, as distinct from one who does the same kind of business without traveling about. That was the view taken of a provision quite similar to the one under discussion in *State v. Wells,* 69 N. H. 424, 45 Atl. 143, cited by appellant's counsel. It seems clear that the conclusion that appellant was a transient dealer or trader could have been reached by the trial court only by departing from the ordinary meaning of those words. We cannot discover anything in the ordinance, taken as a whole, or taking the same in connection with ch. 341, Laws of 1901, to which it refers, to warrant such departure. The words seem to have been used by the law-making power in their plain, ordinary sense.

Numerous cases might be referred to where it has been judicially held, either directly or in effect, that a person who, as agent, merely solicits orders for goods for his principal, whether by sample or otherwise, is not a transient merchant, trader or dealer; that such a dealer is one who goes from place to place, taking with him the chattels which he offers for sale or in which he deals or trades,—a person who con-

ducts his business substantially the same as a peddler. As a rule the cases in which the subject is discussed class peddlers as transient dealers or vendors. In *Comm. v. Farnum,* 114 Mass. 267, there was an attempt to charge the accused with peddling without a license. He merely solicited orders for goods by samples, as agent for another. He did not carry goods with him and offer the same for sale or trade, nor did he deal therein. The court held, in effect, that an itinerant trader is one who goes about selling and exposing for sale articles of personal property, not one who goes about merely taking orders for such goods. In *Hewson v. Englewood,* 55 N. J. Law, 522, 27 Atl. 904, the facts were that one Richardson was a merchant having a permanent place of business in the city of New York. He employed a number of traveling agents to go about soliciting orders to be filled by him out of his stock kept in a store in such city. Hewson was one of such traveling agents. He operated in Englewood, going from house to house. He did not sell any goods, or carry about with him goods for sale. The court held that he was not an itinerant vendor within the meaning of an ordinance of Englewood imposing a license fee upon such persons for the privilege of doing business within its boundaries; that there was nothing in the ordinance precluding a merchant in the city of New York from sending agents into Englewood to take orders for goods, any more than precluding a merchant located within the city of Englewood from conducting his business in the same way. To the same effect are *Stuart v. Cunningham,* 88 Iowa, 191, 55 N. W. 311; *Spencer v. Whiting,* 68 Iowa, 678, 28 N. W. 13; *Davenport v. Rice,* 75 Iowa, 74, 39 N. W. 191; *Kansas v. Collins,* 34 Kan. 434, 8 Pac. 865; *Emmons v. Lewistown,* 132 Ill. 380, 24 N. E. 58; *Cerro Gordo v. Rawlings,* 135 Ill. 36, 25 N. E. 1006; *Comm. v. Eichenberg,* 140 Pa. St. 158, 21 Atl. 258. In the latter case it was directly held that one who travels from place to place soliciting orders for goods to be filled out of

a stock of such goods kept in a store permanently located is not a traveling merchant.

From the foregoing we readily deduce the conclusion that to satisfy the calls of the ordinance in question we must have a person temporarily in *Wausau,* having brought into such city goods of some character for sale and who travels about in such city exposing for sale, dealing, or trading in such goods.

The further point is made that ch. 341, Laws of 1901, upon which respondent city depends, is unconstitutional. Since the points already decided dispose of the case, it seems best to leave the constitutional question for consideration in some case depending upon its solution.

By the Court.—The judgment is reversed, and the cause remanded with directions to render judgment in favor of the appellant.

MERRILL RAILWAY & LIGHTING COMPANY and others, Respondents, vs. CITY OF MERRILL and another, Appellants.

September 11—September 29, 1903.

Taxation: Construction of statutes: Street railway companies paying license fees: Exemption of property "owned": Leasehold interest.

1. Where a statute in terms exempting property from general taxation is only a part of a general statutory scheme substituting a license fee or other impost in lieu of general taxation, such statute is to be construed liberally in favor of the person required to pay taxes in the substituted form.
2. The word "owned", as used in statutes, is not a technical term, but is a general expression to describe a great variety of interests, and may vary in significance according to context and subject matter.
3. Subd. 14, sec. 1038, Stats. 1898, provides that where a street railway company pays the license fee therein mentioned, "all personal property, franchises, and real estate owned and actually and necessarily used" by such company in the operation of its

business shall be exempt from taxation. *Held*, that land leased by such a company for a term of five years and used as specified was "owned" by the company within the meaning of the statute and was exempt from general taxation; and such exemption applies not merely to the leasehold interest but to the land itself.

MARSHALL, J., *dissenting*, is of the opinion that a liberal construction of the statute should not go farther than to exempt all property which, if it were not for the license fee system, would be directly taxable to the street railway company.

APPEAL from a judgment of the circuit court for Lincoln county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

The plaintiff company was the owner of and engaged in operating a street railway and electric lighting business in the city of *Merrill.* Its power plant having been destroyed, the individual plaintiffs, *Cotter et al.,* who were principal stockholders, purchased a tract of land with water power appurtenant, and constructed thereon a power plant building, with connection with said water power and with a steam engine, and in May, 1899, rented indefinitely, and in September, 1900, by formal written lease, leased to the company for a period of five years, all except four acres of said tract of land, together with the dam and water power and all flowage privilege; reserving, however, as appurtenant to the four acres not leased, the right to use all water power in excess of the needs of the company. The company agreed to pay all taxes. Since May, 1899, the plant has been used and operated by the company to supply the electric power for its street railway and its lighting business. In 1900 the entire tract of land, including both that leased by the individual plaintiffs and that reserved, was treated as exempt by the taxing officers of Merrill, but in 1901 such entire tract was placed upon the tax roll, and assessed to the individual plaintiffs, its fee owners, at the value of $20,000, and was included in the general tax levy for both 1900 and 1901, against protest before the board of review that it was not taxable because it was a part of the entire plant and property of the railway

and lighting company, which had paid license fees in lieu of all taxes, in compliance with the statutes relating to such property. The tax roll being returned to the city treasurer, this suit was brought by both the railway company and the owners of the land to remove the cloud and declare void the tax so far as it related to any land except the reserved four acres.

The court having found the facts substantially as above stated, and decided that the land leased to the railway and lighting company was not subject to taxation, a division of values was made, and the proper tax upon the reserved four acres was ascertained by stipulation, and judgment entered declaring void the entire tax so levied and discharging the lien therefor upon payment of the proper amount of tax on the four acres; from which judgment the defendants appeal.

For the appellants there were briefs by *John Van Hecke,* attorney, and *Thomas J. Mathews,* of counsel, and oral argument by *Mr. Van Hecke.* To the point that the word "owned" as used in tax statutes refers to legal ownership, and that lands held under lease are not owned by the lessee, they cited *Douglas Co. Agr. Soc. v. Douglas Co.* 104 Wis. 429; 12 Am. & Eng. Ency. of Law (2d ed.) 324, 325; *Tracy v. Reed,* 38 Fed. 69, and cases cited; 25 Am. & Eng. Ency. of Law (1st ed.) 120; Black, Tax Titles, § 106.

For the respondents there was a brief by *Curtis & Reid,* and oral argument by *A. H. Reid.* As to the meaning of the word "owned," they cited Rapalje & L. Law Dict. OWNERSHIP; 17 Am. & Eng. Ency. of Law, 299, 300, and notes pp. 301, 302; *Lozo v. Sutherland,* 38 Mich. 168, 171; *Orr v. Shraft,* 22 Mich. 261; *Choteau v. Thompson,* 2 Ohio St. 114, 122; *Wis. R. L. D. Asso. v. Comstock L. Co.* 72 Wis. 464; *Galligan v. Providence,* 11 R. I. 258; *Shoote v. Harvey,* 105 Pa. St. 222; *McKee v. McCardell,* 22 R. I. 71, 46 Atl. 181; *State v. Wyl,* 55 Mo. 67; *Baltimore & O. R. Co. v. Walker,* 45 Ohio St. 577, 16 N. E. 475; *Dutro v. Wilson,* 4 Ohio St.

102; *Bronk v. Becker,* 17 Wend. 320, 323; 2 Bouvier, Law Dict. 565; *Dow v. Gould & C. S. M. Co.* 31 Cal. 649; *Dubois v. Hepburn,* 10 Pet. 1; *Radcliff v. Wood,* 25 Barb. 52; *Burns v. Keas,* 21 Iowa, 263; *North Penn. R. Co. v. Davis,* 26 Pa. St. 238; *Mourilyan v. Labalmondiere,* 30 L. J. M. C. 95, 1 E. & E. 533; *Hunt v. Harris,* 34 L. J. C. P. 249, 19 C. B. (N. S.) 13; *Carr v. Stringer,* E., B. & E. 123; *Baltimore v. Canton Co.* 63 Md. 218; *Tompkins v. A. & K. R. Co.* 21 S. C. 420; *Tutt v. P. R. & A. R. Co.* 28 S. C. 388; *Taite v. Gosling,* 27 Weekly Rep. 394, 8 Cent. Law J. 462; *Gitchell v. Kreidler,* 84 Mo. 476; *Wellington v. Stare,* 52 Ark. 266; *Loonie v. Hogan,* 9 N. Y. 435; *Wilder v. Haughey,* 21 Minn. 101; *Hartman v. Munch,* 21 Minn. 107; *Severin v. Cole,* 38 Iowa, 463.

DODGE, J. Our statutes subjecting those engaged in operating street railways, with or without electric lighting and power plants, to a charge graduated upon their gross revenues, in lieu of other taxation, as a part of that scheme contain the provision (subd. 14, sec. 1038) to the effect that upon payment of such license fee "all personal property, franchises, and real estate owned and actually and necessarily used by such person, company, or corporation in the operation of its business, shall be exempt from taxation and other license fees." Appellants claim that by the clear words of this statute such exemption is confined to real estate absolutely owned in fee simple, while respondents claim that it extends to include property held by lease, as in the present case. The question presented is without direct authority in Wisconsin, and in solving it we are driven to decide which of two rules is applicable; such rules being thoroughly well established in this state, so that little aid is obtainable from other jurisdictions where one or other of them has not been so fully adopted.

On the one hand, it has been held in this state that statutes

exempting property from the general rule of taxation are to be construed with the utmost strictness, and that, as so construed, the word "owned," in statutes describing exempt property, must receive its most limited meaning, and be satisfied only by complete and entire ownership, or at least not by leasehold title. *Weston v. Shawano Co.* 44 Wis. 242, 256; *Milwaukee v. Milwaukee Co.* 95 Wis. 424, 69 N. W. 819; *Katzer v. Milwaukee,* 104 Wis. 16, 80 N. W. 41; *Douglas Co. Agr. Soc. v. Douglas Co.* 104 Wis. 429, 80 N. W. 940. On the other hand, it is equally well settled that, where the statute in terms exempting property from general taxation is only a part of a general statutory scheme substituting a license or other impost in lieu of general taxation, the rule of strict construction has no application, but, on the contrary, such a statute is to be construed liberally in favor of the person required to pay taxes in the substituted license form. *Milwaukee & St. P. R. Co. v. Crawford Co.* 29 Wis. 116; *Milwaukee & St. P. R. Co. v. Milwaukee,* 34 Wis. 271, 277; *State ex rel. Abbot v. McFetridge,* 64 Wis. 130, 24 N. W. 140; *Milwaukee E. R. & L. Co. v. Milwaukee,* 95 Wis. 39, 47, 69 N. W. 794; *Duluth, S. S. & A. R. Co. v. Douglas Co.* 103 Wis. 75, 88, 79 N. W. 34.

It cannot be denied that the word "own" is used both colloquially and in the law to designate a great variety of interests in property. As titles and rights to real property vary from the absolute and unqualified fee simple to that of the mere occupant, so the word "own" or "ownership" varies in its significance. For most practical purposes the tenant under a lease for 1,000, or even for 100, years exercises as complete control as the holder of the fee simple. The holder of a fee subject to be determined on some remote contingency, or the holder of a life estate, satisfies the ordinary conception of ownership, but the gradations from this phase of partial ownership to that of the mere tenant from month to month are nearly infinite in number, and each almost infinitesimal

in degree. It seems, therefore, quite impossible to draw any line logically between the absolute and unqualified fee simple on the one hand and the mere right of occupancy on the other. Hence it is not surprising that we find the word in statutes given the widest variety of construction, usually guided in some measure by the objects sought to be accomplished in the particular instance. This has led some courts to declare that the word has no precise legal signification and may be applied to any defined interest in real estate. *Gitchell v. Kreidler,* 84 Mo. 476. It has been applied to a merc bailee in construing log-driving lien statutes in Wisconsin. Sec. 3337, Stats. 1898; *Wis. R. L. D. Asso. v. Comstock L. Co.* 72 Wis. 464, 40 N. W. 146. The instances where the word "own" has been held satisfied by something less than absolute and entire ownership are far too numerous to permit citation. The following are a few in which mere leasehold interest has been deemed sufficient: *Gilligan v. Aldermen,* 11 R. I. 258; *State v. Wyl,* 55 Mo. 67; *Proctor v. H. & St. J. R. Co.* 64 Mo. 112; *Choteau v. Thompson,* 2 Ohio St. 114; *Baltimore & O. R. Co. v. Walker,* 45 Ohio St. 577, 16 N. E. 475; *North Penn. R. Co. v. Davis,* 26 Pa. St. 238; *Schott v. Harvey,* 105 Pa. St. 222, 228; *Eglinton v. Norman,* 46 L. J. Q. B. 557; *Mourilyan v. Labalmondiere,* 30 L. J. M. C. 95. Thus it appears very clearly that the word "owned" is not a technical term; that it is a general expression to describe a great variety of interests, and may vary in significance according to context and subject matter. That being so, we are constrained by the rule of the Wisconsin authorities to give to it in the statute now under consideration as liberal construction as it will reasonably bear in favor of the respondent company, which has paid the full license fee imposed by law in lieu of all other taxes. The applicability of this rule requiring liberality of construction of course renders nonauthoritative the cases where, as expressly declared, the court was bound to adopt the most strict and limited meaning of which the same word was capable.

In the light of these rules for construction, then, we have to consider whether the legislature can in reason be supposed to have used the word "owned" in so general a sense as to be satisfied by a leasehold right for a term of five years. The purpose of this whole scheme was to measure the contribution of street railways to the public revenues by the earning capacity of their plants as entireties, recognizing that such plants include many elements which are peculiarly intangible and difficult of valuation by ordinary methods, such as the franchises to do business; the privileges to use highways and public grounds; the questionable title to the structures affixed to such realty and consequent difficulty of valuation specifically; the uncertainty, if not absence, of sale value of each element of the plant, except as used in connection with every other part and in connection with the special franchises and privileges. It seems to us entirely probable that the legislature intended in a general way to exempt from specific assessment and taxation those things which, in association with each other, help to produce the gross revenue on which the license fee is to be measured. In this view it is difficult to see why leased property should not fall within the purpose of the exemption as readily as that owned absolutely, while actually used for the purposes of the enterprise. What difference would it make that this power plant had been purchased? Such fact would neither enhance nor diminish the gross earnings of the entire plant, nor the contribution thereto of this particular property. Why should the legislators care whether the dynamos in the power house or the motors on the cars were owned or leased? In either case they contribute equally to produce the revenue on which the license fee is graded. A further consideration arises out of the general public policy that the entire plant should not be subject to enforced disintegration or severance by process of law. This policy has been so emphatically declared, and the reasons for it so fully explained, that we need only refer to its existence. *Wilkinson v. Hoffman*, 61 Wis. 637, 21 N. W.

816; *Fond du Lac W. Co. v. Fond du Lac,* 82 Wis. 322, 52 N. W. 439; *Chapman V. Mfg. Co. v. Oconto W. Co.* 89 Wis. 264, 60 N. W. 1004; *State ex rel. Mil. St. R. Co. v. Anderson,* 90 Wis. 550, 562, 63 N. W. 746. Is it not probable that a public policy so important that it has been held sufficient to impliedly repeal or restrain statutes regulating the enforcement of mechanics' liens and the execution of judgments should have been deemed a sufficient reason why even leased property, constituting an integral part of a railway plant and system, should not be subject to be wrenched from such association by the process of sale provided for collection of taxes laid on specific realty? Other considerations might be urged, but those suggested are sufficient to show that the use of the word "owned" in a sense to be satisfied by a leaseholding is not so unreasonable as to be unwarranted under the rule of liberal construction which must guide us. We accordingly hold that at the time of the assessment and levy of the taxes assailed the power plant and water power, except so much of the latter as was reserved in appurtenance to the other lands of the fee owners, was "owned and actually and necessarily used" by the plaintiff corporation "in the operation of its business," within the meaning of those words in subd. 14, sec. 1038, Stats. 1898, and was, therefore, not subject to general taxation.

A suggestion is made by appellants that this exemption statute might be satisfied by a severance of titles in the specific real estate, and by treating as exempt merely the leasehold interest of the street railway company, and subjecting the other interests to general taxation. Such severance would be wholly foreign to the general scope and policy of our laws for taxation of real estate, and would render unworkable those providing for enforced collection. Wherever the tax statutes deal with real property, they refer to the land itself. The tax is laid thereon regardless of either the manner or extent in which title thereto is divided, and the enforcement

statutes are all predicated upon the idea that the sale is to cut to the bottom, to carry the ultimate and fundamental title; and those statutes require that, if there is to be any severance upon the sale, it must be of portions of the land itself, so that to whatever is sold complete title shall pass. The same suggestion now made by appellants is discussed and disposed of adversely in *Baltimore v. Canton Co.* 63 Md. 218, 235; *Sisters of Charity v. Detroit,* 9 Mich. 94, 102; Burroughs, Taxation, 223.

We are convinced that the rules of construction heretofore adopted by this court warranted the trial court in holding this parcel of land exempt, and that the judgment is right.

By the Court.—Judgment affirmed.

MARSHALL, J. (*dissenting*). I cannot concur in the conclusion in this case. The court seems to have so plainly fallen into error that argument is unnecessary to demonstrate it; that the exact situation needs but to be clearly stated. I take no exception to the view that in case of a license fee system of taxation as to specific property, as that of a railway company, made to take the place of the general system applicable to other property, the law in that regard should be liberally construed, if necessary, so as to include all property which would be taxable by such general system to the railway company if it were not for such license method. To go further, however, and include property taxable to other persons under such general system and justify it by the power of the court to judicially construe, goes outside the limits of such power into that of legislation.

I may not get the judicial idea intended to be expressed in the opinion of the court; but to avoid one doing violence to words under the guise of construction I must conclude that my brethren do not claim that subd. 14, sec. 1038, Stats. 1898, was intended to do more than render property, which would in the absence of the statute be directly taxable to the

railway company, in lieu thereof taxable indirectly under the license fee system. To that extent, it seems, the law voices its purpose too plainly to admit of any attempt to construe it. If the court had viewed the case presented in that light and determined first the question of whether the power plant, of which the railway company was a mere lessee, would in the absence of the fee system of taxing its property be taxable to it, the question of whether the word "owned" as used in the law means more than absolute ownership would have been immaterial. Passing over the fundamental question, as it seems the court did, the case was made to turn wholly on the meaning of the word "owned." I assume that no one will question that, if it were not for the section of the statute under consideration, realty circumstanced as that in question would be taxable to the landlord under sec. 1043; and that if the former section were repealed it would be so taxable. Then the court has extended subd. 14, sec. 1038, beyond its legitimate scope by applying it to property not taxable by such system to the railway company before the enactment.

The mere statement of those propositions, to my mind, as before indicated, clearly shows that a mistake has been made, and that the judgment of the circuit court should be reversed.

WOLFGRAM, Respondent, vs. TOWN OF SCHOEPKE, Appellant.

September 11—September 29, 1903.

Highways on town lines: Apportionment: Change of boundaries: Liability for injuries caused by defect before reapportionment.

Under sec. 1273, Stats. 1898,—providing that where the supervisors have determined by order what part of a town line highway shall be made and kept in repair by each town and what part of the damages, if any, shall be paid by each, each such

town shall have all the rights and be subject to all the liabilities in relation to its part of the highway as if the same were wholly located in such town; but if the territory of either town be increased or diminished by a change in the boundaries that part of said order fixing their liabilities shall be deemed vacated, and a new order apportioning their liabilities shall be made before the time for making the next tax roll,—such an increase of territory does not relieve one of the towns from liability for injuries sustained a few days after the change, and before the time for a new apportionment, by reason of an insufficiency in its part of the highway due to defective construction thereof by said town prior to said change of boundaries.

APPEAL from an order of the circuit court for Oneida county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

Previous to April 29, 1897, townships 35 and 36 north, of range 11 east, were parts of different towns in Forest county. The town boards of said towns had laid out and apportioned a joint town road, which was constructed and maintained as apportioned. By ch. 278, Laws of 1897, which took effect April 29, 1897, township 36 was made part of the town of Gagen, and township 35 was made part of the town of *Schoepke,* Oneida county. The town of Gagen maintained the west eighty rods of this road, and the town of *Schoepke* the east eighty rods of this road, as apportioned by the towns in Forest county, when the townships were parts of that county. The east end of the road diverged for a short distance from the town line. During the year 1898 the town of *Schoepke* reconstructed the east end of the road, building it upon the town line, and closed the old traveled track. This change was completed by January 30, 1899. There was a hole on this new part of the highway, which had been covered with poles by the town authorities when it reconstructed this east end. Respondent alleges that while driving on the highway this structure gave way, and thereby caused the wheels of his wagon to drop into the hole, throwing him to the ground and causing the injuries which are the basis of this

action. A demand for satisfaction, served on the town of *Schoepke,* was rejected before this action was brought.

All changes prior to the enactment of ch. 244, Laws of 1899, were ratified by the towns. Ch. 244, Laws of 1899, increasing the territory of the town of Gagen, went into effect April 26, 1899. The accident occurred on the 5th of May following. The answer alleges that the change of territory by this act terminated the agreement, and, if any liability existed, made the towns of *Schoepke* and Gagen jointly liable, and prayed for the abatement of the action. Plaintiff demurred to the answer, and asked leave to amend his complaint. The demurrer was sustained, and leave to amend was granted. This is an appeal from the order sustaining the demurrer.

The cause was submitted for the appellant on briefs by *A. W. Shelton* and *Geo. W. Latta,* and for the respondent on the brief of *John Barnes.*

SIEBECKER, J. It is insisted in argument that the appellant town is not liable as alleged in the complaint, because ch. 244, Laws of 1899, changed the territory of the town of Gagen. It appears by the pleading that the highway in question is upon the line between the appellant town and the town of Gagen. An order was made designating the parts of this highway to be made and kept in repair by each of the two adjoining towns. This order was acquiesced in and acted upon by the towns up to the time of the enactment of ch. 244, Laws of 1899. By this act the boundaries of the town of Gagen were changed and its territory increased. The injury complained of is alleged to have occurred on May 5th following, being on the ninth day after the enactment of ch. 244, Laws of 1899. There is no dispute in the pleadings but that the defect complained of is due to an alleged insufficiency of the highway as constructed by appellant some time prior

to the change of territory of the town of Gagen by this legislative act. Under this state of facts, the liability for this insufficiency must be deemed unchanged by the legislation specified. The insufficiency is alleged to be wholly due to the omission of duty of the authorities of the appellant town, imposed upon it under the order of the town boards, which assigned to it this part of the highway to construct and keep in a proper state of repair. By this order, made under sec. 1273, Stats. 1898, it follows that "each such town shall have all the rights and be subject to all the liabilities in relation to the part of such highway to be made or repaired by such town as if wholly located in such town."

Appellant's contention that the legislation which went into effect April 26, 1899, abrogated this order of apportionment, and absolved it from the liability charged in the complaint, cannot be approved. To give this legislation such construction would relieve appellant from the consequences of its negligence, incurred prior to the passage of the act. The provision of the statute involved is:

"That part of the order fixing their liabilities shall be deemed vacated, and a majority of the supervisors of each of such towns shall, before the time for making the next subsequent tax roll, meet together and make a new order apportioning their liabilities on account of such highway."

It is obvious that the time for a reapportionment of this highway by the supervisors of such towns had not yet arrived when the accident occurred. To construe the statute as contended for would, in effect, cast the burden of appellant's default, incurred prior to the time of such legislation, upon the town of Gagen. No such result can be said to have been reasonably contemplated by the statute. It fails, in terms and by implication, to impose such a liability on the town of Gagen; nor does it seem to contemplate a release of the appellant from the consequences of its default in performing

a legal duty. The complaint seems definite in charging the insufficiency to be due to defective construction of the highway by the town of *Schoepke* prior to April 26, 1899.

By the Court.—The order of the circuit court is affirmed.

DANFORTH and others, Appellants, vs. CITY OF OSHKOSH and others, Respondents.

May 12—October 20, 1903.

Perpetuities: Charitable uses: Gross term: Personalty: Trustees: Power to sell: Devise or grant of land for public library: Validity: Title.

1. Our statutes against perpetuities (secs. 2038, 2039, Stats. 1898) are applicable to grants and devises for charitable purposes. MARSHALL and SIEBECKER, JJ., dissent.
2. Sec. 2039, Stats. 1898, permits suspension of the absolute power of alienation for a gross term not exceeding twenty-one years.
3. Neither the statute nor the common law in this state prohibits perpetuities in personalty.
4. The absolute power of alienation is not suspended, within the purview of the statute, when a trustee or other donee of the legal title is given authority to sell and convey complete title.
5. Where, pursuant to a devise to trustees, land was conveyed by them to a city absolutely, to be used by it perpetually as a site for a public library, subject to a provision that if the land should cease to be so used it should revert to the heirs of the testatrix and the heirs of her deceased husband, there was no violation of the statutes against perpetuities:

   (a) The use to which the land was to be devoted being a corporate one, both the legal title and the beneficial or equitable right was held by the city in its corporate capacity; hence no trust was created or imposed upon the city, and it took the title in fee.

   (b) If the restraints upon the use or disposal of the property were limitations only, they were so repugnant to the grant as to be void.

   (c) If a condition subsequent was imposed thereby, so that on breach thereof the fee would determine, the future estate

in possession dependent upon such condition was so vested in the heirs named that the absolute power of alienation was not meanwhile suspended.

MARSHALL and SIEBECKER, JJ., are further of the opinion that if the statutes against perpetuities are applicable to conveyances for charitable purposes, the express legislative authority to the city to maintain a public library and to take title to land for that purpose was a repeal *pro tanto* of such statutes or created an exception thereto.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Appeal from judgment of the circuit court affirming the final order of distribution entered by the county court in the matter of the will of Abby S. Harris. By that will, executed in 1891, the testatrix, after various personal donations to her kindred and the kindred of her deceased husband and for other purposes, by the fourteenth paragraph of the will gave and devised all the residue, real, personal, and mixed, to *Gabriel Bouck, Orville Beach,* and *Mary A. Olcott,* to hold in trust for certain defined uses and purposes, namely, in founding, preparing, conducting, and maintaining perpetually a public library, with all the appurtenances and all things thereto pertaining, and the necessary library buildings and premises,

"to be so constructed and maintained as aforesaid upon my homestead lots in said city and on the northeast corner of Washington street and Jefferson avenue, to wit [description], if owned by me at the time of my decease."

This grant is made

"upon the express condition that within three years after my decease the said city of *Oshkosh,* the citizens thereof, or other persons or parties, or any, either, or all thereof, within three years from my decease, shall raise, grant, give, and donate to the said city of *Oshkosh* for the same purpose an amount equal to the value of my property hereby so donated. . . . When said equal amount shall be so raised and donated as aforesaid, . . . then the property so hereby given

[etc.] to my said trustees for the purposes aforesaid, or the proceeds thereof and the net income therefrom, shall be transferred, conveyed, assigned, and set over absolutely by my said trustees, by necessary and proper instruments of conveyance and transfer, to the said city of *Oshkosh* . . . or any lawful trustees by it lawfully selected, and upon the absolute donation and transfer to said city of *Oshkosh* or trustees aforesaid of the aforesaid equal amount and the same to be approved by my said trustees, the whole thereof, except so much of the principal as may be used for the purposes aforesaid, and the net income thereon, to be a perpetual fund, to be used and enjoyed by said city of *Oshkosh* or trustees as aforesaid, perpetually, for the purchase, providing, obtaining, supplying and maintaining a library building and premises, and public library . . . upon my lots and premises now owned by me on the corner of Jefferson avenue and Washington street [same description as before], if owned by me at the time of my decease, then said library building shall be perpetually maintained thereon and such public library maintained therein. If the whole of said fund and net income thereon shall not be wholly used and enjoyed and appropriated for the uses and purposes aforesaid, then the property hereby given, granted, bequeathed, devised and donated, or the proceeds thereof or the income thereon (except the income that may have been lawfully used and enjoyed and appropriated for the purposes aforesaid), shall revert to my lawful heirs and to the lawful heirs of my deceased husband, Marshall Harris, one half to my heirs and one half to my said husband's heirs. My said trustees, until the expiration of said three years after my decease, or until said equal amount shall be raised, given, and donated as aforesaid, may sell, convey, transfer, assign, set over absolutely, or rent any property, real or personal, hereby given [etc.] and invest the same, or the proceeds thereof, as they may deem advisable and for the best interests of such fund, but not to rent beyond three years from my decease. [Power to execute necessary conveyances.] Provided however that the instrument of transfer and conveyance of my said lots and homestead premises on the corner of said Washington street and Jefferson avenue shall contain a limitation to the title or interest conveyed that same shall cease and end and revert to my heirs

and the heirs of Marshall Harris, deceased, my husband as aforesaid, when the same shall no longer be used and enjoyed for such library purposes as herein provided."

Provision was then made for supplying vacancies among the trustees.

"The said city of *Oshkosh* shall be responsible for the faithful execution by said trustees of the property, proceeds, fund, and income hereby donated or executed, and may, if deemed advisable, execute and carry the same out by trustees lawfully selected, but the city of *Oshkosh* shall be responsible for the acts of said trustees.

"Before my said trustees shall so transfer said property, proceeds, and income as aforesaid, the said city of *Oshkosh*, by resolution or ordinance of its common council, by a vote of two thirds of the members, shall accept and agree faithfully to carry out and execute the condition hereof and of said trust."

Prior to June 21, 1898, the executor, having paid all the specified legacies, made his final account, with prayer for final assignment, distribution, and discharge of the executor, and the county court on that date made its order allowing his account, and ordering the residue paid over to *Bouck et al.*, as trustees, in trust for the purposes and uses specified in paragraph 14 of the will. The amount was ascertained by appraisal to be $75,734.33. Thereupon, on the 23d day of June, 1898, the city of *Oshkosh* paid over to said trustees an exactly equal amount of money, raised by said city, to be devoted to the purposes of the library; whereupon the said trustees, on the same day, paid and transferred all said property, real and personal, to the city of *Oshkosh*. Prior to such payment, the city, by its common council, duly accepted the donation, agreed to raise and did raise an equal amount, and agreed that the same should be held by the said city of *Oshkosh* for the erection of a public library building and the maintaining of a public library, as provided by said will, and that no part thereof should be used for any other purpose,

and that the amount should be kept separate from all other funds of the said city. The city also, by a special election held in May, 1895, decided, in compliance with sec. 931, R. S. 1878, to establish a library and levy tax therefor.

It is also found as a fact that prior to trial and judgment in circuit court the city had erected a public library building upon the homestead premises, and then was maintaining a public library therein, and had performed all the conditions of said gift on its part. In August, 1898, the heirs at law of the testatrix and of her deceased husband, Marshall Harris, appealed from the final order of the county court, and especially from that part which assigned the residue of the estate to the trustees named for library purposes. On trial in circuit court the order of the county court was affirmed by judgment entered April 1, 1902, from which judgment all of said appellants in the court below bring this appeal.

For the appellants there was a brief by *Barber Brothers,* attorneys, and *Jones & Stevens,* of counsel; a separate brief by *John M. Olin,* of counsel; and oral argument by *Mr. B. W. Jones* and *Mr. Olin.*

Charles Barber and *Gabe Bouck,* of counsel, for the respondent *City of Oshkosh.*

Dodge, J. The testatrix, Abby S. Harris, by her will, now before us, has earned the right that her name be writ large among those who loved their fellowmen, and has sought to give her charity practical efficacy in a most wise and admirable field and generous form. Much as we must admire such efforts to promote the welfare of her fellows, we are nevertheless burdened with the duty of testing the scheme adopted by the testatrix by the rules and limitations which the legislature has deemed wise to impose for the protection of the welfare of the community in other directions.

The appellants contend that the scheme involves such suspension of the power of alienation as is forbidden by sec.

2039, Stats. 1898, and, by sec. 2038, Id., renders void the estate attempted to be conferred upon the city of *Oshkosh.* Further, they contend that, even if such forbidden perpetuity is created only as to the homestead, yet that is sufficient to defeat the title to all the property, because the use of the rest is only authorized for the erection and maintenance of a library upon the homestead premises as a site. To escape this objection and sustain the devise, we are strongly pressed to hold that our statute against perpetuities has no application to grants for charitable purposes. This subject would at first glance appear to have been set at rest by the decisions in *De Wolf v. Lawson,* 61 Wis. 469, 21 N. W. 615, and *Beurhaus v. Cole,* 94 Wis. 617, 69 N. W. 986, made by consensus of all members of the court, wherein it was held that a grant of realty for charitable uses was void because it suspended the power of alienation to the extent prohibited by sec. 2039, Stats. 1898. Counsel, however, urge that expressions found in the opinion in *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345, invite the profession to believe that the question is considered still an open one. Whether that language, used as it was without mention of the *Cole Case*—indeed, in apparent oversight of the decision of the question in both the former cases—could have been intended to suggest a doubt as to their authority, we must confess that upon careful inspection it may warrant some measure of uncertainty among the profession upon this very important subject. This leads us to the view that, although affirmance of the judgment might result upon other grounds, we ought to remove any uncertainty arising from the cited remarks in the *Harrington Case,* and declare the view of the court, since the question is squarely presented and argued with much vigor and learning. Of course, what was said in that case had no relation to anything in fact decided, did not in any wise lead to nor support the conclusion reached by the court. It therefore cannot be given the weight of authoritative precedent, or war-

rant hesitation in following the settled rule of decision, if we find such exists.

The question is one purely of statutory construction. However fully members of this court may believe in a policy which would permit perpetuities in charitable grants, we should transcend our rightful powers should we attempt to establish or enforce such a policy in defiance of legislative declaration of a different one. We may therefore dismiss from present consideration those decisions of courts elsewhere, acting under different statutory conditions, in support of either a liberal or a restrictive policy. Our original statute on the subject (secs. 14, 15, ch. 56, R. S. 1849) was taken *in hæc verba* from New York, and declared:

"Sec. 14. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter; such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed.

"Sec. 15. The absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate, except in the single case mentioned in the next section."

In this there is no express exception of grants to charitable uses. The words are general, and only in defiance of their literal force could any such exception be allowed. At the time they were adopted from New York, no court of last resort had placed any qualification upon their literal meaning. True, an assistant vice chancellor (Sandford) had expressed an opinion that charities were intended to be excepted (*Shotwell v. Mott,* 2 Sandf. Ch. 46), but he, of course, spoke without final authority, subject to review by higher courts. The literal efficacy of this statute apparently was neither questioned nor affirmed in Wisconsin until *Ruth v. Oberbrunner,* 40 Wis. 238, in 1876, in which it was decided that the cognate

statute, sec. 1, ch. 57, R. S. 1849 (now sec. 2071, Stats. 1898), by general language abolishing uses and trusts, was subject to no exception in favor of trusts for charities, and in which it was further said, apropos of an objection that the statute against perpetuities also rendered invalid the devise there under consideration, "We do not see how the objection is to be overcome, but will not express an opinion upon it." Meanwhile the courts of New York had been wavering over the construction of the same statute there. The court of last resort, having once only, and that with serious division, declared itself in favor of exemption of charities (*Williams v. Williams,* 8 N. Y. 525), had, after several expressions of doubt and disapproval of that case, settled definitely to the contrary view, and overruled *Shotwell v. Mott, supra,* and *Williams v. Williams, supra,* thereon. *Leonard v. Burr,* 18 N. Y. 96, 107; *Levy v. Levy,* 33 N. Y. 97; *Bascom v. Albertson,* 34 N. Y. 584; *Holmes v. Mead,* 52 N. Y. 332. The last of these cases was decided in 1873, and all were cited and commented upon in *Ruth v. Oberbrunner* in 1876. Immediately thereafter our legislature entered upon the task of enacting the Revised Statutes of 1878, aided by three commissioners of broad learning and thorough intimacy with such subjects as those involved in chapters 95 and 96, R. S. 1878. They had *Ruth v. Oberbrunner* and the above-cited New York cases before them, and re-enacted the general prohibition against both perpetuities and trusts, with only certain specified exceptions in favor of certain charitable grants, to wit, those to literary or charitable corporations. Secs. 2039, 2081, R. S. 1878. The revisers' notes, communicated to the legislature as a basis for their action, make perfectly clear their understanding that the words used allowed no exception in favor of charities except those expressed in the amendment. They said:

"In section 2039 amendment is made to allow grants or devises in perpetuity to literary or charitable corporations. It

is thought that this ought not to be extended to religious corporations, but left only to those which are formed for advancing literary or charitable ends. The decision in *Ruth v. Oberbrunner,* 40 Wis. 238, shows a defect in the law as it is, which is generally admitted to require amendment. We have endeavored to afford it without too great innovation. In that spirit it is provided that corporations under our laws can alone enjoy the benefit of such a grant, because they are within legislative control under the constitution, while they can readily be formed to possess all necessary powers for the full enjoyment of all the benefits which should follow such a provision in the law."

According to all canons of construction, such a history as this ought to exclude any supposition that the legislature in 1878 intended a further exception in favor of *all* grants for charitable purposes. Such a supposition would convict them of utter redundancy in the newly enacted express exceptions. It would ignore the maxim, *expressio unius est exclusio alterius,* and would deny to the general words of prohibition their natural meaning and force. As an original question of construction, we should feel entirely clear that any suspension of the absolute power of alienation, excepting those expressly exempted in the statute itself, for whatever purpose, charitable or otherwise, was intended to be prohibited by the legislature in 1878. Such view of the legislative intent and understanding is confirmed by various enactments excepting grants for specific charitable purposes. Illustrations are subd. 4, sec. 561*j*, Stats. 1898, authorizing grants to the board of control for any purpose connected with institutions under their management, and providing, "No such conveyance or devise shall be subject to the limitations provided in other cases;" also subd. 3, sec. 389, Stats. 1898, authorizing gifts for benefit of university, "without being subject to the limitations and restrictions provided by law in other cases." The latter enactment is understood to have been prepared by one of the commissioners who drafted sec. 2039, R. S. 1878.

The intent of the legislature being thus clearly established, is there any declaration of this court, which, as a binding precedent, should control our decision at the present time? Counsel point to *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103, and *Gould v. Taylor Orphan Asylum,* 46 Wis. 106, 50 N. W. 422. An examination of these cases fails to disclose any attempt to construe our statute forbidding perpetuities in real estate. In response to very vigorous argument and citation of authorities to show that exception in favor of charities is made by the English courts, with whom, and not by statute, originated the rule against perpetuities in that country, the court said, in the former case (46 Wis. 95, 50 N. W. 1106):

"The English doctrine of perpetuities applied to estates both real and personal, and grew up by a series of judicial decisions. Perry on Trusts, secs. 377, 379. It appears to have been applied to private trusts, but not to trusts for charitable uses, which usually are essentially and indefinitely permanent. Perry, secs. 384, 687, 736;"

and then proceeded to quote from *Odell v. Odell,* 10 Allen, 1, 6, the reasons in support of such policy. No attempt was made to declare that our statute makers had adopted that policy, but the statutes were cast aside for the reason that they applied only to real estate, from which consideration the court proceeded to reason that all grants of personalty, whether for charitable or private uses, were intended to be relieved from any restraints as to perpetuities. That this was the ground of decision is rendered even more obvious by the accompanying case of *Gould v. Taylor Orphan Asylum,* where it is said (46 Wis. 117, 50 N. W. 423):

"The same view is taken of the will in this case as of the will in *Dodge v. Williams,* that the whole scope and tenor of the will demonstrate that the power of sale was mandatory, and that it is therefore to be considered as a will of personalty only. In this view, the principles upon which the charitable

bequests are sustained in *Dodge v. Williams* are as applicable to this as to that case."

That no exemption from the statute against perpetuities in favor of charitable grants of realty was declared in these two cases is fully confirmed by the next case on the subject, *De Wolf v. Lawson,* 61 Wis. 469, 21 N. W. 615, where was a devise of realty, in trust to rent the same for twenty years, and to pay the net rents to two specified churches for the support of the preaching of the gospel therein, admitted to be a charitable purpose. The devise was assailed by the successful counsel in *Gould v. Taylor Orphan Asylum,* and the opinion written by the same justice. They both assume, in brief and opinion, that the statute prohibits perpetuities in real estate for any charitable uses save only such as are expressly excepted by the amendment of 1878, and, notwithstanding a vigorous contention that such statute did not apply to charities at all, supported by citation of *Dodge v. Williams, Williams v. Williams,* and *Shotwell v. Mott,* the court decided this devise void because the express exception was too limited to include it. Surely, if *Dodge v. Williams* and *Gould v. Taylor Orphan Asylum,* had decided anything adverse to this, Cole, C. J., and Mr. Fish must have known it.

In *Webster v. Morris,* 66 Wis. 366, 28 N. W. 353, certain perpetual charitable trusts were sustained by holding that the estate was converted into personalty, and that "the statute applies only to real estate." Again, as already stated, the statute was applied to charitable devises in *Beurhaus v. Cole,* 94 Wis. 617, 69 N. W. 986, although counsel for the city urged its nonapplicability on the same grounds, and cited the same cases now relied on. Further, after *Harrington v. Pier,* already referred to, came the case of *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 650, where this court, after great consideration and debate, decided to adhere to the conclusion reached in *Dodge v. Williams,* to the effect that by adoption of our statute prohibiting perpetuities in real estate our leg-

islature had, by implication, set aside the common-law rule against perpetuities in personal property. The only basis of reason upon which that conclusion could rest was and is that the legislature, in enacting sec. 15, ch. 56, R. S. 1849, intended to cover the whole field of perpetuities, to substitute entirely a statutory policy for the pre-existing court-made rule of policy of the common law. To hold that such intent was so clear that it must by implication annul the common law as to personalty, which was not within the express words of the statute, and at the same time to rule that it was not sufficiently obvious to exclude the common-law rule as to charities, which did fall within the literal words of the enactment, would be the height of inconsistency.

It is said, however, that New York, whose decisions, following those above cited, fully support the doctrine that the legislative scheme or policy was intended to wholly abrogate that of the common law, has changed its policy, and now recognizes charitable grants as unhampered; but this change of policy has not resulted from any modification of the views of its courts as to the construction, force, or effect of the statutes which we adopted and have maintained. It has been accomplished by the legislature, which in 1893 changed the former statutes. True, the enactment making the change was given a construction broader than some might think permissible, but none the less the change has been accomplished by the legislature, and not by the judiciary. *Allen v. Stevens,* 161 N. Y. 122, 55 N. E. 568.

Our conclusion on this subject is both that the statutes, as an original question of construction, prohibit suspension of the power of alienation for the forbidden period, whether the grant be for charitable or other purposes, save for the express exceptions; also that all the prior decisions of this court are in support of such a construction, and the question is not an open one in this state. If the policy is unwise, it can be further modified for the future by the legislature, without sacrifice

of rights acquired upon faith of the present statutes and the construction given thereto by this court during at least twenty-five years.

II. We must therefore proceed to consider whether the bequests and devises under which respondent claims do involve such suspension of absolute power of alienation as is prohibited by secs. 2038, 2039, Stats. 1898. Inspection of the will makes apparent that the testamentary scheme involves a division of the title into two stages, and a separation of the property itself into two, if not three, classes, to each of which stages of title and classes of property different rules of law may apply.

First, there is a period of three years in gross during which all the property is permitted to remain in the hands of three trustees, and is claimed to be inalienable within the prohibition of sec. 2039, Stats. 1898. While the question was perhaps an open one in Wisconsin at the time this case was tried at circuit, it is now settled that the present statute permits suspension of the power of alienation for a gross term not exceeding twenty-one years. *Kopmeier's Will,* 113 Wis. 233, 89 N. W. 134. Hence the ruling of the circuit judge sustaining the devise as against this objection has already been confirmed by this court.

Again, the contention that the fund to be realized out of all the property, real and personal, apart from the homestead, is so tied up in perpetuity, even after it reaches the city, as to be forbidden, is very completely overruled by the recent decision in *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 650, and the cases there cited. We there held, in reaffirmation of the doctrine of *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103, that neither statute nor rule of common law in this state prohibits perpetuities in personalty. We also held that the absolute power of alienation of real estate is not suspended, within the purview of the statute, when a trustee or other donee of the legal title is given power and au-

thority to sell and make conveyance of complete title. Such power and authority is by the present will expressly conferred both upon the intermediate trustees and upon the city with reference to all real estate except the homestead. This consideration suffices to overcome the contention in hand without passing upon the further question whether that authority to sell is not integral to so obvious a scheme to reduce the whole to a fund as to work an equitable conversion of the whole into personalty, within the doctrine of *Dodge v. Williams, supra,* and *In re Albiston's Estate,* 117 Wis. 272, 94 N. W. 169, and many intervening cases.

Thus we are brought to the question whether, after the homestead reached the city of *Oshkosh,* the absolute power of alienation was to be so suspended that the statute renders void the estate attempted to be conferred upon that corporation. That such estate was a future one at the time the will took effect cannot be doubted, for there intervened the vesting of legal title in the three trustees, *Bouck et al.,* for a term not exceeding three years. If the grant to the city was as trustee merely, with the equitable beneficial interest in others, suspension of the power of alienation would probably be obvious, for the instrument conferring the legal title upon the city by most obvious implication restrains it in perpetuity from ever parting with that parcel of land. Restraint upon alienation is not inconsistent with a mere legal title in trust for others, and its disobedience, or any abandonment of the enjoined use, may be prevented by a court of equity at the instigation of those who are to enjoy the benefits as *cestuis que trustent. Kopmeier's Will,* 113 Wis. 233, 89 N. W. 134. It becomes important, then, to ascertain what sort of title to the homestead the will directs to be conveyed to the city of *Oshkosh.*

In considering the quality of such title, it is first to be noted that the will nowhere declares that such land is to be held in trust by the city. The sole declaration is that the

property is to be conveyed to the city absolutely for use in constructing and maintaining a library building and public library upon the specified lots. Of course, the presence or absence of words declaring an estate to be in trust is not conclusive, though they may be more or less significant of the purpose in the grantor's mind. *Davies v. Davies,* 109 Wis. 129, 85 N. W. 201; *Kopmeier's Will,* 113 Wis. 237, 89 N. W. 134. The question is whether the testator's intent involved the elements of a trust as known to the law. The most important of those elements is a severance of the legal title with power of control over the property from the beneficial interest therein. If the donee of the legal title is to control and manage the property entirely for his own benefit, there is no trust. 1 Perry, Trusts (4th ed.) § 13. "A trust exists where the legal interest is in one person and the equitable interest in another." *Wallace v. Wainwright,* 87 Pa. St. 263. The trusts authorized by our statute must be "for the beneficial interest of any person or persons"—of course, other than the trustee. Subd. 5, sec. 2081, Stats. 1898. Mr. Perry says, *ubi supra:*

"But no person can be both trustee and *cestui que trust* at the same time, for no person can sue a subpœna against himself. Therefore, if an equitable estate and a legal estate meet in the same person, the trust or confidence is extinguished, for the equitable estate merges in the legal estate."

Obviously, a deed of premises to A., to be used by him only for a residence for himself, would not create a trust. It would create merely some form of legal title, either complete or limited, and the right to insist on such limits would be a legal one. The devise under consideration seems almost as simple as the last illustration. The land in question is given to be used as a site for a public library. The maintenance of a public library and ownership of a site therefor is one of the strictly corporate functions of the corporation to which legal title is given. Secs. 931–936, S. & B. Ann. Stats.; sec.

1, ch. II, and subd. 29, sec. 4, ch. VI, of Oshkosh charter (ch. 59, Laws of 1891). The only person to be benefited is the corporation, the city. True, every citizen as an individual is interested, but all of the citizens so interested together make up the corporation, the city of *Oshkosh*. It is indistinguishable in principle from a grant of land to be used only for a city hall or an engine house. If such parcel of land were conveyed to third persons, to hold in trust for the purpose of allowing the city to erect and maintain thereon its public library, or other specified municipal building, could there be any doubt that the city, as a corporation, would be the *cestui que trust* and the only party entitled to subpœna against the trustee to enforce such trust? Certainly none. But if the city be the owner of the beneficial interest when the legal title is held by another, it is no less so because that legal title is held by itself for the same uses. In case of an individual holding to his own use, as above illustrated, the absence of any trust is so plain that we find no decided case discussing it, except perhaps one cited by Perry, where the legal title descended to one already holding the equitable. *Goodright v. Wells,* 2 Doug. 771. But mental confusion seems to have been not infrequent in cases of corporations vested with legal title for a specified purpose. This perhaps is not surprising, as the mind naturally turns to a distinction between a corporation and the individuals composing it. The decided cases are numerous, however, which declare the conclusion that, if the use limited is distinctively and purely a corporate one, the corporation itself holds the beneficial or equitable right, which therefore merges in the legal title, if that also be held by it. The right of individuals interested in the use of the property is, as members, to compel the corporation to perform its duties as a corporation, not, as *cestuis que trustent,* to regulate its conduct as a trustee. *Williams v. Williams,* 8 N. Y. 525, 536; *Levy v. Levy,* 33 N. Y. 97, 117; *Le Couteulx v. Buffalo,* 33 N. Y. 333; *Wetmore v. Parker,*

52 N. Y. 450, 459; *Vail v. L. I. R. Co.* 106 N. Y. 283, 12 N. E. 607; *Fosdick v. Hempstead,* 125 N. Y. 581, 589, 26 N. E. 801; *Beurhaus v. Cole,* 94 Wis. 617, 627, 69 N. W. 986; *Fitz Gerald v. Big Rapids,* 123 Mich. 281, 82 N. W. 56; 2 Dillon, Mun. Corp. (4th ed.) §§ 566 *et seq.* We can see no escape from the conclusion that this homestead is directed to be conveyed to the city of *Oshkosh* for its own corporate use as a municipal corporation; that both legal title and beneficial interest are held by it in the same, to wit, its corporate, capacity. Hence no trust is created or imposed upon it.

This being so, and the direction of the will being that the property be conveyed to it absolutely, with no limitation except such as results from the direction that a public library be perpetually maintained thereon by expenditure of all the income of the fund consisting of the devised property and the equal sum contributed by the city, the title taken is a fee; either fee-simple absolute or a base or conditional fee, according as the limitation be considered repugnant to the grant and void, or a valid condition subsequent upon which title shall determine. Sec. 2026, Stats. 1898; 1 Washburn, Real Prop. (5th ed.) 83. The taking of such complete title is, however, subject to the further inquiry whether the attempted limitations upon the use or disposal bring the situation within the statute against perpetuities, so as to render the attempted estate void. That, then, is the next question.

When a fee is granted, limitations inconsistent with a fee, either on the use or on the grantee's freedom of conveyance, are deemed to be void, as repugnant to the main purpose of the grant, unless, by reasonably direct language, disobedience of such limitations is declared a condition subsequent upon which the title conveyed is to terminate. The law does not permit the grantor to convey full title to land, and yet to restrain the conduct of the grantee with reference thereto in respects essential to a fee, though equity does recognize such

a power when, and only when, a trust is created as hereinbefore explained. *Saxton v. Webber,* 83 Wis. 617, 626, 53 N. W. 905; *Van Osdell v. Champion,* 89 Wis. 661, 665, 62 N. W. 539; *Zillmer v. Landguth,* 94 Wis. 607, 69 N. W. 568; *Kopmeier's Will,* 113 Wis. 233, 89 N. W. 134. If the limitations upon the city's use and disposal of the property conveyed to it "absolutely," and therefore in fee, are mere limitations, and so repugnant to the grant as to be void under the rule of the above cases, of course there is no suspension of power of alienation, for then the title would be in fee-simple absolute, with full power in the city to convey at any time. Whether that is the true situation we do not decide, for the view next to be expressed renders such decision unnecessary to the issues now presented.

If the intent of the testator was merely to vest a fee in the city upon condition subsequent that it should terminate and be divested upon failure to use the homestead as a library site, or to devote all income from the other property to maintenance of a public library, then, as we hold that no equitable title is created, it follows that the rest of the legal title is in some one else, either vested or contingent, or both vested and contingent. Either there is remainder to the class composed of the heirs of testatrix and those of her husband, or a reversionary right by descent in the heirs of testatrix alone. Whether one or the other is immaterial, for in either case the interest of remaindermen or reversioners is vested, within the definition of our statute pertaining to the subject of perpetuities (sec. 2037, Stats. 1898), which declares an estate to be vested "when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate." Obviously, if the city's intermediate estate were to terminate at this moment, the persons entitled to take as remaindermen or reversioners are in being. This subject and the meaning of this statute are so fully treated in *Moran's Will,* 118 Wis.

177, 96 N. W. 367, that nothing more need be said thereon. If the future legal estate is vested, then the power of alienation is not suspended within the force of those words in our statutes, as explained in the *Moran Case. Coster v. Lorillard,* 14 Wend. 265.

We therefore conclude and hold that (a) the title conferred upon the city is not in trust, but a fee; (b) if the restraints upon use or disposal of the homestead are limitations merely, they are so repugnant to the grant as to be void; and (c) if a condition subsequent is imposed thereby, so that on breach of those limitations the fee is to determine, the future estate in possession dependent upon such condition is so vested that the absolute power of alienation is not meanwhile suspended; and, ultimately, that the devise first to trustees, and then to the city of *Oshkosh,* is valid.

It is urged by appellants that such conclusion as we have now reached conflicts with the decision in *Beurhaus v. Cole,* 94 Wis. 617, 69 N. W. 986, in which case two parcels of real estate were granted to the city of Watertown "in trust" to be used in perpetuity, one as the location for "a home for aged and poor people of the city," the other, outside the city limits, as "a driving park and agricultural grounds." The obvious distinction between the two cases is that in the present we conclude that no trust was created, while in the former it was conceded by both litigants and assumed by the court that the only title conferred on the city was in trust and as trustee, so that express or necessarily implied prohibition against alienation was effectual. Whether the court might have reached a different view as to the quality of the title granted as to one or other of the parcels of land, had the question been raised and investigated, we need not decide. Its ultimate decision was based on an assumed condition which does not exist here. It may properly be remarked, however, that there were circumstances in the *Cole Case,* absent here, tending to support at least the contention that only a trust

title was granted. The language of the will very clearly expressed such an intent. The purpose, certainly as to the home for aged and poor, was far less clearly for the sole and exclusive purpose of the municipal corporation, although it might have been sufficiently germane and aidful to its general purposes to enable it to accept a donation of property to be so applied. There is authority to the effect that a municipal corporation has inherent power to receive gifts of property in trust to promote purposes not so strictly municipal that a city could undertake them originally at general expense. *Maynard v. Woodard,* 36 Mich. 423, 426; *Chambers v. St. Louis,* 29 Mo. 543, 579; *Vidal v. Girard's Ex'rs,* 2 How. 127; *Perin v. Carey,* 24 How. 465, 505. Whether such power rests in our Wisconsin municipal corporations, however, we need not decide in distinguishing this case from *Beurhaus v. Cole,* for the reasons stated. If the assumption of a trust in that case was not warranted by the facts, it was by consensus of the litigants.

For the reasons stated, we hold that the assignment and distribution of certain portions of the estate to the trustees, *Bouck et al.,* for the purposes expressed in the final order of the county court, was in accordance with law, and, there being no other complaint of that order, that its affirmance by the circuit court was without error.

By the Court.—Judgment affirmed.

MARSHALL, J. (*dissenting upon a primary question, but concurring in the judgment*). The inspired apostle proclaimed more than 1800 years ago: "Charity never faileth." That sentiment has ever dwelt in the heart of man as the better part of him. It has been crystallized into the governmental system of every civilized community and in none more significantly than those blessed with the common law. Courts of chancery have been for centuries, and from their earliest history, its special guardian. In their administration it was

always assumed that the idea that "charity never faileth" was so thoroughly entrenched as the public policy of organized society that no written law should be deemed to involve an assault upon it in the absence of language therein specializing to the contrary. By that rule of construction no serious difficulty was ever found in excluding charities from the scope of general language in legislative enactments, not mentioning them specially, or from common judicial rules as to property, whenever the claim was made that freedom to deal therewith as regards conveyances thereof to charitable uses was invaded thereby. When devises of land to corporations were restricted by enactments in general terms, the court easily held that such dispositions nevertheless could be freely made for charitable uses; that if the law would not permit the corporation grantee to take, the rule should apply that "a trust shall never fail for the want of a trustee." When the courts came to deal with the statute of 43 Elizabeth, c. 4, defining specifically what should be deemed of a charitable nature, there was no hesitancy in holding that the scope of the enactment extended beyond the letter thereof, including everything within its spirit. "Charity never faileth" was the effective guiding star of chancery at every step, wherever there was room within the broad field of judicial power to follow it that far without violating any unquestionable law to the contrary. The same spirit has dominated the courts of this country no less than those of England, they assuming, as to statutory enactments regarding trusts and perpetuities, that charities were not in the legislative mind where not expressly mentioned. Having convictions along those lines coming from long and patient study of the history of the subject, ancient and modern, and convictions that our legislative and judicial history, as a whole, are in harmony therewith, notwithstanding a high regard for the deliberate judgment of my brethren, that commonly causes doubt as to the correctness of my own view when contrary thereto,—that the opinion in

this case at first impressed me with a feeling of astonishment, is most natural. Time for reflection, necessary for bearings to be taken regarding what judicial duty required from my standpoint—whether it would be satisfied by a mere protest or more was demanded—left me in such doubt as to any probability of good resulting from proclaiming my views, that silence in that regard for a time seemed best. But later it seemed that I had no right to take that course in the face of the many evidences we have of good springing from the free, independent personal expression of judicial views in a situation like this. "Cast thy bread upon the waters and ye shall find it after many days," may well be a guide in the circumstances before us, where such a great public question is involved. So, with faith rather than hope as to beneficial results, I take up the burden of discharging the duty that seems to call for the labor.

The public misfortune that would be involved in a loss of the great charity which the benevolent woman designed for the people of her city has been averted, but by pure accident, so to speak, since it does not seem likely that she, or her advisers, had in mind at the time her scheme was put in form that invention of courts, made to permit avoidance of the statute on the subject of perpetuities, that a conveyance to a corporation for a particular purpose of a charitable nature does not create a use or involve a trust implying an equitable title in others, but is a conveyance of the whole title subject to be defeated upon a condition subsequent; nor have in mind the conditions subsequent, expressly embodied in the devise,—*as a means of saving the creation* from being destroyed by the statute. It is not probable that any one concerned in the matter suspected want of power in the donor to do with her own what she wished, the purpose being public and there being no fatal indefiniteness in her creation.

It is much to be regretted that this court, upon a review of its entire judicial history, has reached the conclusion that it

must stand substantially alone in holding that the general language of statutes on the subject of perpetuities covers property devoted by deed or devise to charitable purposes. That the law is otherwise elsewhere, and well nigh universally so, we may safely assert. That cannot be successfully challenged. The courts of New York, though starting right, drifted with most disastrous results into error. This court followed suit to some degree, though not always consistently or fatally, as I shall endeavor to show, till this case was reached. After half a century of misfortune resulting from the departure from *Williams v. Williams,* 8 N. Y. 525, the New York court, in *Allen v. Stevens,* 161 N. Y. 122, 55 N. E. 568, declared, in effect, that its course in that regard was a most lamentable mistake and it proceeded to completely efface such mistake, pointing, it is true, to a legislative enactment as calling for such action, but without justification, it would seem, in the light of ordinary judicial rules. We will refer to that subject at length later.

Some reference seems proper, if not necessary, to the statement found in the opinion of my brethren, that counsel for respondent, in their brief, made an unwarranted use of *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345, in that they gave heed to *obiter* discussion in the opinion. The court used this language in the opinion here: "Counsel urge that expressions found in the opinion in *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345, invite the profession to believe the question is still an open one," referring, as will be seen, to the question of whether realty conveyed in trust for a charitable use is excepted from the statute on the subject of perpetuities. Now we have searched the brief of counsel with all the care we can devote to the matter in order to discover what "expressions" are referred to, but cannot find anything that at all satisfies the court's suggestion, except language to the effect that in the *Harrington Case* the reasoning and conclusion of the New York court in *Levy v. Levy,* 33 N. Y. 97,

and *Holmes v. Mead,* 52 N. Y. 332, were rejected, and the doctrine of *Williams v. Williams,* 8 N. Y. 525, approved. Such language, with the context thereof, fairly shows that what was said in the *Harrington Case,* which was in counsel's mind, without misapprehension as to its import, had reference solely to the question of whether charitable trusts must be tested by the essentials of private trusts as to definiteness of beneficiaries to enforce the trust. That must have been overlooked by my brethren. We venture the assertion that not a word can be found in the *Harrington Case* suggesting that the statute on the subject of perpetuities does not apply to realty in a case like this. Four minor subjects were presented for decision: First. Does the doctrine of equitable conversion apply to the facts? Second. Is the purpose to which the property was bequeathed of a charitable nature? Third. Must a charitable trust be tested by the essentials of a private trust as to definiteness of beneficiaries? Fourth. Is there any law in this state on the subject of perpetuities respecting personal property? No other question was decided or adverted to. *Williams v. Williams* was referred to with approval as to the third proposition, it being said that while New York departed from the *Williams Case* so far that it took the aid of a legislative enactment to accomplish the return, this court, though it went astray in *Ruth v. Oberbrunner,* 40 Wis. 238, made a quick return in *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103. That was distinctly affirmed in *Hood v. Dorer,* 107 Wis. 149, 82 N. W. 546. It is not involved in this case, and if it were of course no one would question the soundness of the previous decision. Further, care was taken in the *Harrington Case,* from the beginning to the end, to restrict the decision to personal property. It was therefore sufficient for the purpose of this case to so state. Why the occasion was taken to dignify the claim of counsel, if there were such claim, that there was a shadow of a reason for supposing the case went further, and make that

a basis for treating the subject of whether charities are within our statutory prohibition as to suspending the absolute power of alienation, we cannot perceive. It is suggested that the contrary doctrine in *De Wolf v. Lawson,* 61 Wis. 469, 21 N. W. 615, and *Beurhaus v. Cole,* 94 Wis. 617, 69 N. W. 986, was overlooked. Enough has been said to show that nothing decided on the subject in either of those cases was involved in the *Harrington Case.* There is not the remotest suggestion in either as to whether indefiniteness of beneficiaries is fatal to a charitable trust. There was, therefore, no occasion whatever to refer to them in the connection suggested by the court. *De Wolf v. Lawson* was referred to on another branch of the case as to a conclusion since affirmed and most distinctly in this case. Perhaps it would have been better, in connection with the express restriction of the decision to personalty, to refer to *Beurhaus v. Cole* as holding to a contrary rule as to realty. But, whatever the cause was for the omission, it was participated in by all the members of the court. That cause, in my judgment, was twofold: First, the case did not affect any question considered or decided; second, the question decided in the former case did not receive such consideration as to leave any lasting impression upon the mind of any member of the court.

It may be that that part of my brethren's opinion above discussed goes upon the theory that a proposition decided in the *Harrington Case,* though presented for decision and vital to the right of the matter in some aspects thereof, was not germane thereto because not necessarily decided, some other point being decisive of the case, in any aspect thereof, hence that such proposition might have been entirely omitted, and the discussion thereof be properly regarded as *obiter.* I cannot think for a moment that such a position would be considerately taken, and I have the strongest evidence thereof in this case where the grounds are stated for the decision, as we will hereafter show. If I am wrong in this, then the sugges-

tion for which I have endeavored to assign a possible reason presents a matter of great importance as regards the application of other cases to the primary subject under consideration, so we will give attention thereto.

We deem it well settled that it is proper to consider and decide every question on appeal that might influence the final result in any aspect of the matter. *Dodge v. Williams* is a striking example of that method of judicial treatment of a subject, and the regard which has been shown for the points decided by such treatment is a clear demonstration of what I have said. The case is peculiarly significant because what is there said in deciding a nonessential proposition, and the conclusion reached, after being referred to repeatedly by individual justices in subsequent cases as *obiter,* were later decided to be judicial determination of the highest importance. There, counsel who attacked the trust appealed to the statutes on the subject of perpetuities and trusts. It would have been sufficient for that to have said that such statutes were confined to realty. However, evidently considering that such treatment of the matter would not be in all respects a fair response to the argument of distinguished counsel in the case, the court proceeded to show that the policy that dictated the statutes did not include charities. On that, reference to the fact that the common-law doctrine was in harmony therewith was proper, and such reference, in effect, was a decision on the subject, holding that our statutes should be so regarded; yet the court, *ex industria,* kept the door open on that question as to realty, using language to indicate that what was said was not to be deemed an authoritative decision on that subject. The question was legitimately suggested for argument, and was decided, though not generally, because of the restriction which the court placed upon it. That must be so upon the general rule that all questions assumed to be involved and decided in reaching a conclusion on an ultimate issue are deemed to be as effectually solved as such ultimate issue itself.

For the case in hand, the decision as to the statute not applying to personalty and that the rule requiring definite beneficiaries to enforce the trust does not apply to charities, would seem to be sufficient to have completely disposed of the case; yet the court proceeded to decide the further question that might have been vital in a different aspect of the matter,—whether the common law as to perpetuities was abrogated in this state. The conclusion reached, as we have before seen, has been distinctly held to be unquestionably judicial (*Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 650), though it had been frequently referred to as *obiter,* somewhat upon the theory which we now feel called upon to criticise. *De Wolf v. Lawson,* 61 Wis. 469, 473, 21 N. W. 615; *Webster v. Morris,* 66 Wis. 366, 28 N. W. 353.

We will now take up the task of comparing the situation in New York, when it returned to the doctrine of *Williams v. Williams,* with our own, endeavoring to show that the insurmountable difficulties to our doing likewise do not exist.

When our statutes were adopted the law of New York, without room for sound controversy, was supposed to be clearly voiced in *Shotwell v. Mott,* 2 Sandf. Ch. 46, decided in 1844. That decision, it must be assumed, was familiar to those responsible for our initial legislation at the time thereof. Therein, by the most emphatic language, it was held that the statutory system of New York did not deal with trusts for charitable purposes, and, inferentially, that conveyances for such purposes were not governed by general statutes but by common-law principles. Perhaps it is true that in adopting such system here four years later it cannot be claimed that such construction was irrevocably embodied therein under the general rule on that subject; yet to reject it as not having any weight at all, worthy of mention, in regard to the legislative purpose, would not seem to be proper. We should not treat the decision as of such little importance, in view of the fact that it is now dignified by the highest

court of New York as containing the very germ principle of the whole discussion on the other side of the controversy, and, in substance, all that was said later in the more extensive discussions of the matter in such court. In that opinion we have distinguished company. No one would claim that Mr. Dixon, after having presided over the deliberations of this court for many years, would, soon after his retirement therefrom, have urged upon it, in the capacity of attorney, a principle which he would not have declared to be the law had he been in a situation to do so. With that preface I quote what he said in the argument in this court in *Ruth v. Oberbrunner,* 40 Wis. 247:

"The statute, modified as we find it, was adopted in this state in 1848. It had then received a judicial construction in New York [referring to two cases, *Shotwell v. Mott* being one of them]. . . . They were received as the law of the state, and were never judicially questioned until 1850; and they have since been affirmed by the most carefully considered decision of the court of last resort, and the rule of that decision has been the established judicial construction of the statute for twenty years. With such judicial construction, so previously given, and so subsequently ratified and confirmed, the statute was adopted here; and by that construction this court is bound. And by that construction, charitable uses and trusts are excluded entirely from the statute."

As above indicated, *Shotwell v. Mott* was followed by an unqualified adoption of the doctrine thereof in *Williams v. Williams,* the same being broadened out so as to plainly include all questions as to the power of the court to deal with trusts for charitable purposes, characterized by indefiniteness of beneficiaries, and those as to the validity of conveyances by devise or otherwise for charitable uses, regardless of the statutes on the subject of trusts and the right to suspend the absolute power of alienation. Three years later, in *Owens v. Missionary Soc.* 14 N. Y. 380, it was overruled as to the power of a court of chancery to administer a trust with in-

definite beneficiaries, upon the supposition that such power depended upon the statute of 43 Eliz. c. 4. That was long ago generally repudiated; the New York court not being an exception (*Allen v. Stevens,* 161 N. Y. 122, 55 N. E. 568), nor the supreme court of the United States (see *Girard's Will Case,* 2 How. 127; *Perin v. Carey,* 24 How. 465; *Kain v. Gibboney,* 101 U. S. 365), which latter court was chiefly responsible for the heresy at the start. *Baptist Asso. v. Hart's Ex'rs,* 4 Wheat. 1. If there be now any exception to the general repudiation of the false doctrine, it is one of little importance. The invasion of *Williams v. Williams* on that point is the one and the only one which the legislature of New York specifically, or at all, so far as we can discover looking to the act itself, gave the court aid to efface. That will be fully shown later. Other phases of *Williams v. Williams* furnished subjects for judicial controversy, without the one specially referred to being treated as absolutely closed, for a long period of years. In *Bascom v. Albertson,* 34 N. Y. 584, decided in 1856, all that remained of *Williams v. Williams* after the first invasion thereof was so clearly uprooted that it would seem that no room was left for any future contention, though the early decision, for years theretofore, had been regarded as of little authority. However, like Banquo's ghost, the subject would never down. It seems that the saying:

> "Truth, crushed to earth, will rise again;
> The eternal years of God are hers.
> But Error, wounded, writhes in pain,
> And dies among her worshippers."

was yet to be demonstrated to its fullest extent. In *Holmes v. Meade,* 52 N. Y. 332, the fundamental error in *Owens v. Missionary Soc.,* that judicial authority to administer a charitable trust depended upon the statute of 43 Elizabeth and that its repeal in New York left the courts there helpless in the matter, was repeated, and in the *subsequent decisions* holding that the general language on the subject of trusts and

perpetuities covers conveyances for charitable purposes, all controversy over the matter was in effect said to be completely closed. That left the overruling of *Williams v. Williams* so strongly entrenched that much courage was required on the part of the judiciary and the profession to again venture upon any discussion of the matter; yet the importance of saving to humanity the inimitable offer, from the point of sight of the time thereof, held out by Samuel J. Tilden to his countrymen—one that, made effective, would have dignified him for all time as one of the most distinguished philanthropists of his own or any age—stimulated the court and all concerned to a vain attempt to find some way of escaping from the consequences of the complete effacement of the sound doctrine first established. In this there is no overdrawn picture of the situation in New York, when it is said that the legislature reached out and rescued the judiciary. The law upon the point respecting which legislative aid was in words extended had been settled expressly, and resettled over and over again, the whole extending over a period of nearly fifty years; and settled upon all other phases of *Williams v. Williams* for about twenty-five years, the initial case in that regard having been repeatedly reviewed and affirmed until it would seem that, if a court can so settle a matter as to leave no possible way open for a change of position, the New York court had attained that end.

Lest it be thought that this opinion contains undue criticism of the New York court, before we are through we will verify what we have said by quoting from the language used by the eminent chief justice who wrote the opinion in *Allen v. Stevens.* We yield to no one in respect for that distinguished court. That it drifted into error after *Williams v. Williams* is but one of the many evidences that courts, however able, are presided over by men, hence, in the nature of things, must be fallible in fact, however much, in a legal sense, within particular cases, they are deemed to be infallible.

Having now given the situation faced in *Allen v. Stevens*, we turn to the history of the subject here. In the first place we have the significant circumstance that we took the New York system with a full and clear exposition thereof,— one which, while not irrevocably binding upon this court as part of the system itself, yet so strongly evidenced the legislative view of the matter when such system was adopted, that by the most familiar rules it should have been deemed binding here in the absence of some overruling decision in the parent state and some strong reason for following it. The New York legislature, in its initial action, had no such guide.

In *In re Taylor Orphan Asylum,* 36 Wis. 534, this court asserted, in language of the plainest character, that the jurisdiction of our judicial system included all that of common-law courts of chancery in superintending and compelling the execution of trusts for charitable uses, such power extending to corporate as well as private trustees. Witness the language of the court:

"In cases of charity, to be administered by trustees, whether private persons or corporations, a court of equity has jurisdiction, at the instance of the attorney general or other proper party, to take an account, and to correct abuse or misuse of the trust funds; and even to remove delinquent or improvident trustees. . . . The court puts itself in motion, without suit or suitor; and this, not blindly or arbitrarily, but in conformity with wise and settled usage. . . . In the absence of a visitor of right or by appointment, the visitatorial power would probably devolve upon the state, and be exercised by or under the authority of the circuit court."

The statute "does not confer the jurisdiction; it only gives the summary proceeding, in furtherance of a jurisdiction already inherent in the court."

The conflict between this court and that of New York at the time that language was used will readily be observed without stopping to point the same out. The doctrine respecting the power of the court over charitable trusts, and that beneficiaries to appear in court for the purpose of moving it in the

matter are neither essential nor possible, because indefiniteness of beneficiaries is a characteristic of a trust for charity,—has never been disturbed here, other than in the cases to which we will allude, which, we will show, have long since been overruled. The line of cases thoroughly entrenching the principle, after the one to which we have referred, are *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; *Sawtelle v. Witham,* 94 Wis. 412, 69 N. W. 72; *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345; *Hood v. Dorer,* 107 Wis. 149, 82 N. W. 546. So much for the statute law here on the only subject expressly covered by the New York act,—the legislative aid, supposed to be so significant.

In *Ruth v. Oberbrunner,* 40 Wis. 238, it was said expressly, that the statute on the subject of trusts, and, inferentially, the statute on the subject of perpetuities, extended to and included conveyances for charitable purposes. In the opinion the court followed so closely the decisions of New York, as to the subject of judicial power to administer a charitable trust, as to pretty clearly suggest that the question was an open one here, not referring, however, to *In re Taylor Orphan Asylum,* to which we have alluded. It is significant in that respect that Chief Justice RYAN, who wrote the opinion in the former case, did not participate in deciding the latter and that subsequently he took occasion to absolve himself from all personal responsibility for what was there said. *Heiss v. Murphey,* 40 Wis. 276, soon followed, where the New York doctrine, that a conveyance for a charitable purpose with indefiniteness of beneficiaries to appear in court and enforce the trust is void, was adopted, it being apparently overlooked that the parent view was that judicial power in that regard was dependent upon the statute of 43 Elizabeth and that the same was not in force in New York, having been expressly repealed at an early day. The features of both of those cases to which we have referred were expressly discredited as not being binding judicial authority or sound

law in *Dodge v. Williams,* Chief Justice RYAN writing the opinion, and remarking that neither of such features was involved in such cases; that there was no question of charitable use in either, and no question of trust in *Heiss v. Murphey;* that the trust failed properly in *Ruth v. Oberbrunner* because it was private and offended against the statutory requisites as to such trusts; and that the devise failed in *Heiss v. Murphey* because it was direct in fee to unascertained and unascertainable persons. That plainly suggested that the decisions should have been different but for such circumstances. With that disposition of these two early cases, which has never been overruled or criticised, why they should now be referred to as authority is not perceived. In the later case, at the very outset the question was up for decision, of whether the two former decisions were or were not to be regarded as authority, a decision in the negative being reached with the concurrence of the learned justice who wrote the matter condemned. It is significant that in *Gould v. Taylor Orphan Asylum,* 46 Wis. 106, 50 N. W. 422, decided at the same time, opinion by such justice, there was an unqualified concurrence in the criticisms of the early cases and in the principles announced in connection therewith, so far as the court deemed the same applicable to a discussion and decision of the ultimate question involved, namely, whether the bequest of personalty for charitable purposes there under consideration was valid.

My brethren refer to the quotation in Chief Justice RYAN's opinion in *Dodge v. Williams,* taken from *Odell v. Odell,* 10 Allen, 1, as if it were a mere oratorical flourish, so to speak, used to embellish the opinion, saying that it was used without any intention of declaring "that our statute-makers had adopted that policy," the statutes being "cast aside for the reason that they applied only to real estate;" the court then proceeding "to reason that all grants of personalty, whether for charitable or private uses, were intended

to be relieved from any restraints as to perpetuities," resting the decision of the case on that ground. That position is beyond my comprehension for these reasons: Chief Justice RYAN, in treating the matter before the court, took up the different positions of counsel attacking the trust, one by one, showing each to be untenable, expatiating from first to last upon the great importance always attributed to the maintenance of charities, and indicating that the policy of the law in that regard had not changed. He took up the subject of mortmain regulations, construing the term in its popular sense—that it extends to gifts of land or money for charitable purposes generally,—saying that such restraints exist only where the policy of the law is to place restrictions upon such gifts which would result in the creation of perpetuities. Much space was taken up by the learned chief justice upon this branch of the opinion, showing that the mortmain law of England never became in any sense a part of our system, either as a part of the common law or by any legislative enactment. He pointed to the significance of there being no legislation on the subject as conclusive evidence of our legislative policy, closing with these words:

"When charitable bequests in this state begin to outrun reasonable provision for the poor, and seriously impede the alienation of property, it will be time enough for a statute of mortmain. The silence of the legislature hitherto, and the observation of all men, are sufficient to show that the time has not yet come, if it ever should."

When we remember that it was then the law of New York that the abolition of the common-law system of charitable trusts and the substitution in its place of a system allowing, in effect, conveyances of property to be held in perpetuity for charitable purposes by means of a corporate grantee with powers expressly defined by the legislature, was to all intents and purposes a system of mortmain restrictions and was so held (*Wetmore v. Parker*, 52 N. Y. 458; *Bird v. Merklee*,

144 N. Y. 544–555, 39 N. E. 645), public trusts being entirely done away with (*Holmes v. Mead,* 52 N. Y. 332), and when we reflect that this court, as then organized, was perfectly familiar with that fact, the conclusion seems irresistible that in saying that which we have quoted, it was intended to decide that the restriction in New York upon charitable trusts did not exist here.

After disposing of the first proposition in *Dodge v. Williams* as indicated, this was stated as a matter to be decided:

"Strenuous objections to the charitable bequests in the will before the court, were founded on the statutes prohibiting perpetuities, and regulating uses and trusts."

That was treated under three heads, either being deemed an effective answer thereto in favor of the trust. These are the heads: (1) Does the statute apply? (2) If not, does the common-law rule respecting perpetuities as to both real and personal property apply? (3) Is the common-law rule respecting perpetuities in force in this state? Each was treated and answered in favor of the maintenance of the trust under consideration. As to the first it was said:

"It is almost sufficient to say, for the purposes of this case, that both of these statutes are expressly limited to realty."

Note the significance of the words *"almost sufficient,"* clearly indicating that the other propositions, yet to be treated, were regarded as important. As to the second it was said that the policy of the common law respecting perpetuities does not extend to trusts for charitable purposes. Then, speaking presently, using the language of an eminent judicial writer, obviously for the reason that it perfectly expressed what was in the mind of the court—language which included citations of decisions made under both common law and the statutory system from which ours was taken,—this was said:

"This rule of public policy which forbids estates to be indefinitely inalienable in the hands of individuals does not apply to charities. These being established for objects of

public, general and lasting benefit, are allowed by the law to be as permanent as any human institution can be, and courts will readily infer an intention in the donor that they should be perpetual. If an alienation of the estate becomes essential to the beneficial administration of the charity, it may be authorized by a court of chancery;"

thus plainly disposing of the proposition of whether the common law policy as to charities had been changed by any legislative enactment, in favor of the negative. Taking up the last proposition, it was said:

"But were this otherwise, the statute limiting the rule against perpetuities to realty, manifestly abrogates the English doctrine as applicable to personalty."

If there is not a clear decision of the three independent propositions, each treated as sufficient in itself to support the final judgment and each in that regard being well nigh as important as the other, I must admit that I am unable to understand plain English language and apply it to elementary principles as to what is and what is not to be regarded as decided in a case. If I am not right, then what becomes of that doctrine, found everywhere in the books treating upon the subject,—that which has been announced over and over again by this court: that every proposition assumed to be in a case, treated and decided as a basis for a final judgment, is to be deemed to have been as effectually decided as the ultimate question passed upon? *School Trustees v. Stocker,* 42 N. J. Law, 115; *Giffert v. West,* 37 Wis. 115; *Quackenbush v. W. & M. R. Co.* 71 Wis. 472, 37 N. W. 834; *South Bend C. P. Co. v. George C. Cribb Co.* 105 Wis. 443, 81 N. W. 675; *Becker v. Chester,* 115 Wis. 90, 127, 91 N. W. 87, 650; *Pray v. Hegeman,* 98 N. Y. 351.

The significance of the foregoing warrants us in emphasizing the fact that the idea that the result in *Dodge v. Williams,* 46 Wis. 70, 50 N. W. 1103, and its companion case rested wholly on the decision of the proposition as to whether the common-law rule regarding perpetuities respecting person-

alty was in force in this state, gives such dignity to that which was a subject of discussion from *De Wolf v. Lawson*, 61 Wis. 469, 21 N. W. 615, to *Becker v. Chester*, 115 Wis. 90, 91 N. W. 87, 650, covering a period of nearly twenty years, as to whether it was not wholly *obiter*, the decision being based wholly upon other propositions, as of itself to suggest fatal infirmity therein. In *Becker v. Chester*, where the controversy ended, as indicated by my brethren, it was not till after the most earnest discussion and careful consideration that we were able to reach a conclusion that what was said upon the point by Chief Justice RYAN should be regarded as a judicial determination. The most that we then ventured to say was that the proposition involved was presented for decision in the case, that it was one proper to be decided, that it was decided, and *"was one of the grounds upon which the judgment of the court was pronounced;"* hence that the decision thereof was an authoritative judicial determination of the matter under the rule we have stated. Even then, the chief justice, in a very learned and exceptionally elaborate opinion, insisted that the language of the former case was not a binding adjudication, because it was not only fundamentally wrong, but was extra-judicial *dicta*, the chief justice being so powerfully moved by his convictions in the matter that he felt justified in characterizing the decision of his brethren as a *"judicial monstrosity."* I should say in passing that I do not repeat that with any spirit of criticism. It is done only to give added significance to the circumstance, *that the position which the court now assumes in saying that what was supposed to be decided in Dodge v. Williams, but from De Wolf v. Lawson to Becker v. Chester was by some members of the court regarded as a judicial determination in fact and by others as mere obiter, is substantially the only matter which the court in the early case and the one decided with it rested the judgments upon; and further that the justice who first thereafter cast doubt upon the*

judicial character of such early determination is the one who, at the inception thereof, gave to the same the special significance indicated.

But to recur to the question of whether the court, in *Dodge v. Williams,* used the language as to the policy of the law on the subject of perpetuities not including charities as a mere oratorical embellishment of the opinion, there being no intention to suggest that such policy was recognized in our statutes. Significance is given to the language of Justice COLE's opinion in the companion case:

"It is therefore to be considered as a will of personalty. In this view the principles upon which charitable bequests are sustained in *Dodge v. Williams* are as applicable to this as to that case."

We see in that a reference to the principles generally decided in *Dodge v. Williams,* respecting the matter, and not to one of them only. It seems that the learned justice referred to all that the court in the former case assumed to be vital for the purposes of the decision thereof, even though the decision of one of them might have been sufficient upon which to base the judgment. That Justice COLE did not refer specifically to the subject of whether the common-law rule respecting perpetuities was abrogated by statute as to personalty, must be clear from the fact, before indicated, that he later regarded what was said in *Dodge v. Williams* on the subject as merely the personal views of the chief justice.

From what has been said it would seem that no obstacle can be found in our judicial history to the adoption of the doctrine of *Williams v. Williams,* in anything decided until after 1879 and it would not be claimed that any decision prejudicial to such adoption was rendered thereafter till *De Wolf v. Lawson,* in 1884. That is suggested as directly in point. The devise there in controversy was to executors to pay rents and profits in equal proportions for a period of years to the trustees of the Baptist and Methodist Church so-

cieties of the village of Delavan for the support of the preaching of the gospel in the several places of worship of said churches respectively. It will be noticed that the church societies, as organized bodies, were made beneficiaries. The prime essential to a trust for charitable uses did not characterize the trust. The common saying is that charity begins only where definiteness of beneficiaries ends. Here the beneficiaries were certain and unchangeable. It is the indefiniteness of beneficiaries characteristic of a trust for charitable purposes that gives rise to the power of the state, through judicial agencies, set in motion if necessary by public authority, to enforce the trust. Without that there can be no public trust. It is on that theory that the New York court held that there were no public trusts in that state. It is said in the opinion of my brethren that the support of the Christian religion is admittedly the proper subject of a charitable trust. True, but the support of a particular church corporation, in respect to its legitimate corporate expenses, may not be a proper subject of a trust for charity, if the corporation and not the congregation is deemed the beneficiary. There is much reason and authority for that, and it seems that in the case under discussion that was recognized.

It is said by my brethren here that in the brief of counsel and in the opinion of the court there it was assumed that the trust was one for charity. We do not so understand it. Counsel argued the question briefly, saying that charitable trusts were not excepted from the statutory regulation as to perpetuities, citing *Ruth v. Oberbrunner,* 40 Wis. 238, which had been overruled, as we have seen. In the opinion there are at least three significant circumstances leading to the conclusion that the trust was regarded as private by the court: First. Although the question was raised by counsel, there is not a word from the beginning to the end of the opinion referring to the trust as one of a charitable nature. Second. One of the mooted questions was whether the trust was char-

itable. In support of the trust counsel pointed to *Dodge v. Williams.* Justice COLE criticised what was there said as to the statute having abrogated the common-law rule as to perpetuities, using this language: "It may, however, admit of doubt, whether the remark of the chief justice is strictly accurate *when applied to private trusts.*" Why thus, *ex industria,* leave the language of Chief Justice RYAN undisturbed as to charities? Why refer to it at all? We see no purpose thereof whatever, unless the court understood that the trust in hand was of a private character and to be tested by the law regarding private trusts. In harmony with that the ancient law as to such trusts was discussed by the learned justice, this language being used for a conclusion: "Therefore, the law would only allow the testator to *tie up his property for a private trust* for a life or lives in being and twenty-one years and nine months." Third. When the court came to deal with the exception in the statute respecting perpetuities, it was said that a church corporation *is not a charitable corporation* within the legislative intent. It will be noticed that the present chief justice dissented, but whether on the question thus decided or not we are not in a position to state. The holding as to the character of a church corporation shows that strict rules of construction were applied to the statute, not those liberal rules commonly supposed to always rule in such matters. That within such rules such a corporation is of a charitable character needs no discussion. *Andrews v. Andrews,* 110 Ill. 223. By such strict rule it seems the court viewed the matter, and thus unmistakably treated the trust as private. As before suggested, the beneficiaries were two church societies. There was nothing indefinite in that respect. They could appeal to the court to enforce the trust. Public agencies could not deal with the matter indicated in *In re Taylor Orphan Asylum,* for the very obvious reason that the trusts were not public, being for two definite, legal entities, unchangeable in character, for their legitimate cor-

porate purposes. The view entertained by Justice Cole, that in such a case the corporation, and not the members thereof, is the beneficiary, followed to its ultimate conclusion called for a treatment of the matter in hand as we suggest that it was treated.

Beurhaus v. Cole, 94 Wis. 617, 69 N. W. 986, decided in 1897, remains to be considered. The effect of sec. 2038, Stats. 1898, upon trusts for charitable uses was there presented for decision. It was decided, but without, I venture to say, much study of the subject, it being taken for granted that the statute governed. The opinion indicates that. I take my full share of the responsibility and confess, for myself, that I did not give the matter the attention that it ought to have received, not then appreciating the condition of the law, as the study of recent years has enabled me to do. There is little more that can be said as to the *Beurhaus Case.* It is now six years old. The proposition there passed upon was regarded, it seems, as an original question. No previous adjudication of the court was referred to. So little study was devoted to the subject that when the whole field respecting charities, as it appears in our books, passed in review in *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345, three years later, neither the writer of the opinion who endeavored to collate every decision previously made here touching the subject, nor any other member of the court, recalled the case. Doubtless if the later case had involved directly the question previously decided it would have been brought to the attention of the court by counsel, or, if not, the court would have recalled it. Certainly, the decision is too fresh to be a bar to the court's now declaring the law correctly, if a mistake was then made.

Having now shown that while the New York court had a series of decisions departing from *Williams v. Williams,* 8 N. Y. 525, covering nearly half a century, when *Allen v. Stevens,* 161 N. Y. 122, 55 N. E. 568, was decided, and that

we have, even by the court's view, but two adjudications of that character, covering a period of nineteen years, and in my judgment but one, recently decided as aforesaid, it would seem that we need not hesitate to return to sound principles as New York has done, upon the plea that we have no legislative aid in the matter, even if it were true that the New York court had such aid of a substantial character.

To give proper point to the foregoing, one must have in view the precise language of the New York act. We give it here:

"SECTION 1. No gift, grant, bequest, or devise to religious, educational, charitable, or benevolent uses, which shall, in other respects be valid under the laws of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest, or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised, or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the supreme court.

"SECTION 2. The supreme court shall have control over gifts, grants, bequests, and devises in all cases," etc. "The attorney general shall represent the beneficiaries in all such cases and it shall be his duty to enforce such trusts by proper proceedings in the court." Ch. 701, Laws N. Y. 1893.

By comparing this with what has been said, it will be easily seen that the essential features of that law are thoroughly entrenched in our jurisprudence without any legislation whatever. That is of such importance that it will bear reiteration. It will be noted that the legislature, *ex industria,* negatived any purpose to make any trust valid theretofore considered invalid, except so far as expressly otherwise provided, thus, it would seem, plainly saying that so far as charitable trusts were affected by the statutes on the subject of perpetuities, such effect remained as before. Leading

up to a construction of the act, after referring most approvingly to *Williams v. Williams* as stating exhaustively and truly the law as it was at the time thereof and should have continued to be, this sweeping criticism was made in *Allen v. Stevens,* of the numerous decisions that had invaded it:

"That decision, it would seem, should have settled the question in this state; but the struggle between the advocates of a liberal policy towards charities and the opponents of such policy did not stop with such decision."

Thus it will be seen that the contention between the advocates of the two policies was given only the dignity of a struggle between rivals respecting sound public policy. The court gave the history of that struggle in detail, till it resulted in the complete success of the opponents, spoken of, since which time, it was said, *"No attempt to create an original charity has survived the test of an application by the courts of the rules of law to the language employed by the testator."* Numerous instances were cited of devises and bequests of great importance to the public failing by the unfortunate departure from the early position of the court; and it was said, in effect, *that the great wrong thus inflicted, and the means thereof, needed no comment;* that from the point of sight where the judicial history and its effect upon the public could be measured, "the legislature could discover nothing but wrecks of original charities, charities that were dear to the hearts of their would-be founders, and the execution of which would have been of inestimable value to the public;" but that prior to that period it could be seen that, had it not been for the disturbance of the salutary doctrine of *Williams v. Williams,* holding that charitable trusts were "not subject to strangulation by the rule against indefinite beneficiaries, the mischiefs referred to would not have occurred." The legislature "not only saw that a great wrong had been and was being done to the public by the loss of many devises and bequests for the purpose of founding orig-

inal charities, but it further saw that the remedy could only be furnished by it." From that the conclusion was reached that, notwithstanding a disturbance of the law as established by the courts respecting perpetuities was not mentioned in the act, and notwithstanding the letter thereof expressly repudiated any such purpose, the act completely restored the doctrines of *Williams v. Williams*. That, it seems, was accomplished by a process of reasoning which, in a vigorous dissenting opinion, was properly said to be unsound in the highest degree; and, we add, a process which seems unjustifiable except upon the doctrine, hardly having a proper place in judicial matters, that the end justifies the means,—an exhibition of judicial heroics, so to speak, which has no parallel in the books, so far as I am acquainted therewith. No one, it would seem, could read that case without concluding that, if so trifling a legislative aid were sufficient to justify a court to return to sound doctrines, none is required here.

This other significant circumstance, which distinguishes our court from that of New York as regards departing from ancient landmarks, must not be overlooked. There, in conformity to the construction of the statutes given, that they included trusts for charitable uses, it was held that a devise or bequest for such a use to a corporation to be formed is void unless such corporation is by the terms of the devise or bequest to be called into being within the time allowed for the vesting of future estates. *Tilden v. Green,* 130 N. Y. 29–47, 28 N. E. 880; *Burrill v. Boardman,* 43 N. Y. 254; *Shipman v. Rollins,* 98 N. Y. 311. Here, when there was a difference of opinion as to whether the common-law rule regarding perpetuities respecting personal property was in force, it was held that a bequest for the use of a corporation to be formed, no provision being made as to the creation thereof within the time that the future vesting of the title might be suspended, was good (*Webster v. Morris,* 66 Wis. 366, 28 N. W. 353),

following the general rule on the subject, *which depends wholly upon the doctrine that charities are excepted out of all rules statutory or otherwise, as to perpetuities, and on the judicial function respecting cy pres power.* Gray, Perpetuities, §§ 608, 609; *Russell v. Allen,* 107 U. S. 163, 2 Sup. Ct. 327; *Schmidt v. Hess,* 60 Mo. 591.

Another insurmountable obstacle said to exist to our lining up with the general rule that charity is excepted from the general rules, statutory or otherwise, on the subject of perpetuities, is that, where it prevails in the face of written laws in letter declaring to the contrary, the statutory system is different from ours. On that, all opposing authorities seem to have been easily set aside. I dissent from the suggestion that any such diversity of systems exists. Those elsewhere are precisely or substantially like our own, as I read them. Whatever difference exists between the provisions here and those elsewhere, are not in the systems, but in the different views thereof, which is really attributable to the circumstance that in such struggles as that spoken of by the New York court the advocates of applying to written laws those liberal rules that were so effective at common law in excluding charities from general restrictive policies, legislative or otherwise, did not always prevail. To be convinced that such is the case, one has but to compare our statute and the decision of this court now made, with those of Indiana, California, and many other states. *Richmond v. Davis,* 103 Ind. 449, 3 N. E. 130; *Estate of Hinckley,* 58 Cal. 457. In Texas, in face of a constitutional prohibition against perpetuities, it was held that charities were not included therein. *Paschal v. Acklin,* 27 Tex. 173, 196; *Bell Co. v. Alexander,* 22 Tex. 350. In 5 Am. & Eng. Ency. of Law (2d ed.) 902, it is said that charitable trusts are not within the rules against perpetuities, nor are they affected by or within the scope of the statute.

It is said that, to hold that the adoption of that feature of

the common law as to perpetuities respecting realty, only, impliedly repealed the common law on the subject as to personalty, and at the same time to hold that it did not exclude the common law as to charities, would be the height of inconsistency. That means this, I take it: to hold that an enactment as to one part of the common law relating to a specific subject, such law being the outgrowth of a particular policy, adopting only a part thereof, inferentially repeals the remainder; and yet that the common law on another specific subject, governed by a radically different policy, was not included therein, though covered by the letter thereof, is inconsistent to the highest degree. To my mind the very opposite is the reasonable and only reasonable view of the matter. The policy of the common law as to charities was so radically different from that regarding property generally, the one being highly favorable to perpetuities and the other as highly unfavorable thereto, that to say that legislation on one subject adopting part of the common law as to that, in general language, and by silence dropping the other part, must be held to include all of the law found as to the opposite policy because falling within the letter of the enactment, would be illogical to the highest degree. On the principle involved we certainly have most distinguished company, in the supreme court of the United States, and courts and writers generally, as we have seen.

Now a word as to whether sec. 2039, as amended by the Revision of 1878, in connection with the explanatory note of the revisers, should have the effect which the court has attributed thereto. The revisers were all distinguished for their general learning and professional attainments. Two of them, subsequent to their work upon the statutes, became honored members of this court, and performed official services here of inestimable value. The others were their peers in knowledge of the law. I yield to no one in respect for the collective judgment of those men. If it includes what my

brethren suppose, and the idea was incorporated into the statutes, then the decision from which I dissent is right and the law should be so declared, leaving the responsibility for the result to rest with the legislature. But to my mind, the words of the revisers and the result of their advice with the legislature, in connection with what almost immediately followed in this court, tells a far different story from that which the court has read therefrom. As we have seen, up to *Ruth v. Oberbrunner,* 40 Wis. 238, the only decision of importance in this court, touching the subject of charities, was *In re Taylor Orphan Asylum,* 36 Wis. 534, in which, without expressly referring to all points of this subject, the judicial view clearly indicated is that the common law had been in no respect disturbed by statute law. *Ruth v. Oberbrunner,* as we have indicated, was decided in 1876. Then the idea first found lodgment here that the statute on the subject of perpetuities had abrogated the common law in that regard as to charities. The argument of Mr. Dixon in that case, as we have seen, pretty plainly shows that the decision must have struck the profession as a new departure. What the law was theretofore supposed to be is most clearly indicated in the following note of the revisers: *"It shows a defect in the law* which is generally admitted to require amendment." They said that the amendment suggested by them would result, if adopted, in but a moderate innovation. What was the "defect" to which the learned revisers alluded? Plainly, the "defect," not supposed to exist till the judicial declaration referred to, that the statute was so framed as to compel the court to hold that it abrogated the common law as to charities. In other words, independently of the judicial declaration in question, they gave it as their judgment that there was no "defect" in the statute in that it abrogated the common law as to charities. That seems to be the irresistible inference from all the circumstances bearing on the question.

In that light the legislature adopted the amendment suggested.

It is elementary, and statutory as well (sec. 4985, Stats. 1898.), that the effect of the amendment above mentioned, and the continuance of the statute otherwise, was merely to leave the law as it was before, with the added feature. Then, we have, in effect, a legislative declaration based on the advice of the distinguished revisers, that, aside from the "defect," so called, the common law respecting charities would not be deemed affected by the statute. That we deem to be of the highest importance in this discussion.

The Revision of 1878 went into effect the 1st day of November of that year. A few months thereafter *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103, was argued and decided. It must be presumed that this court was familiar with the amendment to which we have referred, and the judgment of the revisers as well. Upon one phase of the case, as we have seen, the question of whether the statute disturbed the common law as to charities, was vital. *Ruth v. Oberbrunner* was pressed upon the attention of the court as controlling in the matter. The whole subject was discussed and considered, the conclusion reached being that there was no statutory restriction in this state respecting conveyances of property for charitable purposes. All said in *Ruth v. Oberbrunner* inconsistent therewith was expressly discarded as not the law. The law was declared to be in all respects as claimed by Mr. Dixon in his argument in the former case. Thus it would seem, without room for reasonable controversy, the supposed "defect" in the statute, to which the revisers referred, was clearly removed. The letter and spirit of the decision is that no such "defect" existed and that the common law, in its entirety, on the subject of charities, was entirely free from any statutory restrictions in this state. In all that, do we not have the will of the legislature,

inferentially but clearly expressed, the judgment of the distinguished revisers, and that of this court as well, all in harmony with the position I here maintain?

I concur in the decision of the court as regards what I have felt justified in characterizing as the accidental features to which the splendid charity which Mrs. Harris created owes its safety from destruction, and would add another, which was urged upon the attention of the court by counsel for respondent. It is this: The city of *Oshkosh* had express legislative authority to take the title to realty by the means the title to that in question was conveyed to it, and to hold such title for the purposes for which the conveyance was made. That, by necessary inference, involved the holding of such property in perpetuity. If it were true that the effect of the statute on conveyances for charitable purposes is, as a general rule, all that is claimed for it, such express authority, *pro tanto,* repealed the statute; perhaps the better way to put it would be, created an exception thereto. That is supported by reason and by abundance of authority. *Levy v. Levy,* 33 N. Y. 124–130; *Bascom v. Albertson,* 34 N. Y. 598.

I have now expressed my views at great length, but not too great, I trust, considering the all-important nature of the subject involved. As indicated at the outset, it was not without much consideration and hesitation that I reached the conclusion respecting my duty to write this opinion. It has been prepared in no spirit of disputation, though it has taken somewhat of that form, at some points. That seemed unavoidable. I cannot, however much I may think it is wrong, hope to change the judicial policy from which I so entirely dissent, by anything I have said or can say. Nevertheless, I conceive it to be incumbent upon me to give the reasons which impel me to dissent from my brethren on an important matter involving the public policy of the state, to the end that if the law be declared wrongly, I may not be held responsible there-

for, and if the legislature shall see fit to deal with the matter, it can do so with all the light that a comparison of views will throw upon the subject.

It is now, seemingly, up to the legislature, as it was in New York in 1893, to say whether a broad policy as to devises of property to charity shall prevail in this state, or not. It will, in the light of the decision in this case, be unmistakable that if the public desire is that men of wealth shall at least be permitted to have a free hand in devoting their property to the benefit of mankind instead of to mere selfish or private ends, legislative aid or command must be had in the matter. Why should such free hand not be permitted? That is the policy which generally prevails in every section of our country. Why should Wisconsin be an exception? The legislature must answer that. The responsibility for the continuance of the exception rests with that branch of the government, regardless of whether it is responsible for having created it or not. If what I have written shall so emphasize that situation as to stimulate remedial action, placing our state in the front rank of communities as regards favoring devises of privately accumulated wealth to charitable objects, it will be a "consummation devoutly to be wished." Shall we have incorporated into our system the thought, so beautifully expressed: "Charity in thought, speech, and deed, challenges the admiration and affection of mankind. Christianity teaches it as its crowning grace and glory, and the inspired apostle exhausts his powerful eloquence in setting forth its beauty and the nothingness of all things without it." "Though" one "speak with the tongues of men and of angels and have not charity" he is "become as sounding brass or a tinkling cymbal; and though" he "have the gift of prophecy and understand all mysteries and all knowledge, and though" he "have all faith so that" he "could remove mountains and have not charity" he is "nothing." 1 Cor. XIII.

SIEBECKER, J. (*dissenting upon an important question, but concurring in the decision*). I concur in the judgment of this court resulting in affirmance of the judgment of the circuit court in this case. I cannot concur in many of the grounds advanced in the opinion of the court as the basis of the decision. It is my opinion that the statutes of this state prohibiting perpetuities and regulating uses and trusts do not apply to trusts for charitable uses; and, if this case be held to come within such statutes, the authority granted by legislative enactment to the city of *Oshkosh* to maintain a public library is, in effect, a repeal *pro tanto* of such statutes.

I therefore concur in the views expressed in the opinion of Mr. Justice MARSHALL.

WALDUM, Respondent, vs. HOMSTAD, Administrator, Appellant.

September 29—October 20, 1903.

Insurance: Benefit societies: Change of beneficiary: Custom: Change not formally completed before death.

Nothing in the constitution, by-laws, rules, or regulations of a mutual benefit society in any manner provided for or restricted the right of a member to change the beneficiary named in his certificate; but it was customary to make such a change at the request of the member upon his surrendering the old certificate and paying a small fee. A member, knowing such custom, wrote to the grand secretary of the society, asking him to change the beneficiary named in his certificate, and was by said officer informed that he must give the certificate and fee to the local secretary, who would forward them to the grand secretary, and the new certificate would be issued. This direction was fully complied with by the member ten days before his death, but the local secretary failed to forward the certificate or fee to the grand secretary, and the new certificate was never issued. *Held* that, as the insured had done all that he was required to do, and only formal, ministerial acts remained to be performed by officers of the society, the change of beneficiary must be deemed complete.

APPEAL from a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

This action was commenced to recover $950 life insurance under a certificate issued by the Independent Scandinavian Workingmen's Association to one Elias Sklet, payable to his estate. It appears from the record and is undisputed or found by the court, in effect, that the Grand Lodge of such association is the governing body, and is authorized to issue certificates to persons who become members thereof on the mutual assessment plan, entitling such members to participate in the beneficial fund of the order to the amount specified in such certificates; that January 13, 1900, Elias Sklet, since deceased, became a member of such association by initiation in Nora Branch No. 10 of the order, and had a certificate issued to him to the amount of $1,000, payable at his death to his estate; that up to the time of his death he paid all sums necessary or required of him to be paid, and was at the time of his death in good standing with the order; that there were no provisions of any kind in the constitution, by-laws, rules, or regulations of the order in any manner providing for or restricting the right of persons insured therein to change the beneficiary by them named in their certificate of insurance; that ever since the organization of the association it had been customary to change the beneficiary at the pleasure of the insured by surrendering the old certificate and the payment of a fee of fifty cents, and a request to have the beneficiary changed to some other person than that named therein, and that Elias Sklet knew that such was the custom and had such custom in mind before his death.

Sklet was a laboring man, and made his home with the plaintiff, who kept a boarding house, and to whom he paid his board when he had the money, but when he had none he was cared for by the plaintiff just the same. He had no relatives in this country, but had two sisters in Norway, whom he seldom heard from. Sklet came to the home of the plaintiff Sun-

day evening September 15, 1901, sick with typhoid fever, and took to his bed, and died September 29, 1901. One Dr. Krohn attended to him during his illness and while so attending him, and on Monday, September 16, 1901, Sklet spoke to him about his insurance, and on the following day directed Dr. Krohn to write a letter to P. J. Smith, the grand secretary of the order, to change the beneficiary named in his policy from his estate to the plaintiff, which letter was written and signed by the deceased on that day. P. J. Smith wrote a letter in answer thereto on Wednesday, September 18, 1901, directing Sklet to send his old policy to one H. A. Johnson, together with fifty cents, and that he could then get a new policy from him. On the same day Sklet gave the letter from Smith, together with his old certificate and fifty cents, to Dr. Krohn, and requested him to take the same to the local secretary, H. A. Johnson, for the purpose of having the beneficiary changed as directed, which the doctor did by handing to Johnson, the next day (Thursday, September 19, 1901), the letter, the old certificate, and the fifty cents, stating that Sklet wanted a new policy and the beneficiary changed from his estate to the plaintiff; and that Johnson took the letter, the certificate, and the fifty cents, and kept them from that time to the date of the trial, and neglected to send them to the grand secretary of the order, and so prevented the change from being made, as it would have been had he observed such request. On Friday, September 20, 1901, Dr. Krohn informed Sklet that the local secretary, Mr. Johnson, had not complied with the request, but Sklet said that it was all right, and that Krohn had done just as he wanted him to do. On that same day the local secretary wrote the president of the order, stating that application had been made to change the beneficiary, but omitted to inform the president that a written, formal application had been made, or that the old certificate and fifty cents had been delivered to him with a request to make the change. The president answered the local

secretary, and made objections to the manner in which an attempt to so change the beneficiary had been made, and advised the local secretary not to do anything with the matter until further instructions. From Saturday, September 21, 1901, until the date of his death, September 29, 1901, Sklet was delirious, and nothing more was done towards changing the beneficiary named in the certificate.

On October 5, 1901, proofs of the death of Sklet were made by the officers of Nora Branch No. 10 of the order. October 7, 1901, the plaintiff notified the Independent Scandinavian Workingmen's Association and the grand lodge that she was the beneficiary under such certificate and was entitled to the money payable thereunder, and she thereupon filed a verified and formal claim therefor. Under the by-laws of the order, when a member dies who has no family, the branch lodge to which he belongs at the time of his death attends to and pays the expenses of his funeral and burial, which the Nora Branch No. 10 did, amounting to $50, which amount was deducted from the $1,000 payable under the certificate.

On November 20, 1901, the defendant, *Elias A. Homstad,* was appointed special administrator of the estate of Sklet, deceased, and on the same day he demanded of the order the amount payable under the insurance certificate, which was refused on the ground that the plaintiff also claimed the same, and no payment thereof would be made to any one until determined by the court. December 31, 1901, this action was commenced by the plaintiff against the association to recover the $950. January 7, 1902, the defendant, *Elias A. Homstad,* was appointed administrator of the estate of the deceased, and duly qualified as such, and on the same day he demanded of the order the amount payable under the insurance certificate, which was refused, and thereupon such administrator began an action in the circuit court against said association, which action is still pending under a stay of proceedings by order of the circuit court. January 29, 1902, the

court ordered the association to pay the money into court, which it thereupon did.

The court finds that Sklet was of sound and disposing mind and memory up to and including Friday, September 20, 1901, and in all respects mentally competent to make a change of beneficiaries in his certificate in such order; that he pursued the course required by his policy and the rules and customs of the order, and fully complied with the written direction of the grand secretary of the order, and did all in his power to so change the beneficiary in his certificate from his estate to the plaintiff; and that the only things remaining to be done were the formal acts on the part of the association, concerning the doing of which it had no discretion, but must act as directed by Sklet. As conclusions of law the court found that September 19, 1901, Sklet changed the beneficiary named in his certificate from his estate to the plaintiff; that December 5, 1901, the plaintiff was entitled to receive the amount of such certificate, $950; that the plaintiff is entitled to judgment in the amount of $950, together with costs and disbursements in this action, to be taxed against the defendant, *Elias A. Homstad,* as administrator of said estate. From the judgment entered thereon accordingly the defendant, *Elias A. Homstad,* appeals.

For the appellant there was a brief by *Pope & Pope,* and oral argument by *Carl C. Pope.* The contended, *inter alia,* that where the rules and regulations of an association provide for the manner of change in beneficiaries, and the assured has pursued such rules and done all things required by them to entitle him to a change, if he dies before a new certificate is issued equity will treat the change as having been made. *Luhrs v. Luhrs,* 123 N. Y. 367; *Supreme Conclave R. A. v. Cappella,* 41 Fed. 1; *McGowan v. Ind. Order of Foresters,* 104 Wis. 173, 181; *Berg v. Damkoehler,* 112 Wis. 587, 590. But in the case at bar the contract of insurance had "no provision of any kind or nature in any manner providing for the

right of a person insured therein to change the beneficiary." The fact that the insured did all in his power to have his contract of insurance changed before his death, in the absence of all rules upon the subject, does not change the contract. There would have to be a new contract between the insured and the association in order to create a new and specific beneficiary. *Alvord v. Luckenbach,* 106 Wis. 537, 539; *Elgar v. Equitable L. Ins. Soc.* 113 Wis. 90, 93; *Stoll v. Mut. Ben. L. Ins. Co.* 115 Wis. 558, 92 N. W. 277; *Berg v. Damkoehler,* 112 Wis. 587, 590.

For the respondent there was a brief by *Frawley, Bundy & Wilcox,* and oral argument by *C. T. Wilcox.*

CASSODAY, C. J. There is no bill of exceptions. The facts are all found by the court, and of course are undisputed. It stands admitted that the association was authorized to issue certificates to its members, according to its constitution, by-laws, and rules, on the mutual assessment plan, entitling such members to participate in the beneficial fund of the order for the amount specified in such certificate. Such was the certificate in the case at bar, issued by the association to the deceased, Elias Sklet, and payable at his death to his estate. The question presented is whether, from the facts found, the deceased succeeded in changing the beneficiary from his estate, named in his certificate, to the plaintiff in this action. Twelve days before his death he wrote to the grand secretary of the association requesting him to change the beneficiary in his policy from his estate to the plaintiff in this action, giving his reasons therefor, and requesting prompt attention. The next day the grand secretary wrote to the deceased to the effect that, in order to get his policy changed, he must give the old policy and fifty cents to his local secretary, therein named, and that such local secretary would then forward the same to him, the grand secretary, and that the deceased would then get a new policy from him. It is undisputed that ten

days before Sklet died he fully complied with such direction of the grand secretary. The contention is that the attempted change of the beneficiary was ineffectual, because the local secretary never forwarded the old certificate or the fifty cents to the grand secretary. There is no claim nor pretense that the grand secretary did not have authority to receive the old certificate and the fifty cents and change the beneficiary, as requested by the deceased twelve days before his death. That he had such authority is manifest from the findings. Having such authority, it was competent for him to direct the deceased, as he did, to deliver the certificate and fifty cents to the local secretary, instead of himself. Having given such direction, and the same having been fully complied with by the deceased, the transaction was the same, in legal contemplation, as though the deceased had delivered the certificate and the fifty cents to the grand secretary personally, and requested him to make such change. In his letter giving such direction the grand secretary informed the deceased that upon his compliance with such direction he would get a new policy from him, the grand secretary. It is found that there is nothing in the constitution, by-laws, rules, or regulations of the order restricting the right of members to make such change. There is nothing in the statutes to prevent such change. On the contrary, the statute expressly declares that:

"Any member may change the beneficiary named in his certificate or policy without the consent of such beneficiary, by complying with the by-laws of the society, order or association which issued the same." Sec. 1955*c*, Stats. 1898, as amended by ch. 101, Laws of 1899.

Since the right of members to make such change was not restricted by anything in the statutes, nor in the constitution, by-laws, rules, or regulations of the order, nor in the contract with the deceased, it is obvious that he was not precluded from making the change in the manner indicated merely because the association had not prescribed a different method for mak-

ing such change. The right of the assured to make such change, under similar circumstances, has frequently been recognized and sanctioned by this and other courts. *Rawson v. Milwaukee M. L. Ins. Co.* 115 Wis. 641, 646, 92 N. W. 378, and cases there cited. Thus it is held in Indiana that:

"Where a member of a benefit association has a right to change the beneficiary named in his certificate, and no prescribed mode of making the change is shown, an assignment of the certificate, with directions to the association to pay the proceeds to the assignee, effects a change." *Milner v. Bowman,* 119 Ind. 448, 21 N. E. 1094. See, also, Niblack, Ben. Soc. & Acc. Ins. §§ 212, 214.

The only remaining question is whether what was done by the deceased under the direction of the grand secretary had the effect to change or modify the contract. It is said by a learned text-writer that:

"When a member has done all that he is required to do under the contract to effect a change of beneficiaries, the change will be deemed complete, even though some ministerial acts of the officers of the society are still to be performed." Sec. 223, Niblack, Ben. Soc. & Acc. Ins.

This court has recently held that, where the insured has done every substantial act required of him, and dies before the new certificate is actually issued, and only formal acts on the part of the association remain to be performed, the change will be considered to have been made, even in an action at law. *McGowan v. Supreme Court I. O. F.* 104 Wis. 173, 80 N. W. 603; *Opitz v. Karel,* 118 Wis. 527, 95 N. W. 948. To the same effect, *Hirschl v. Clark,* 81 Iowa, 200, 47 N. W. 78, 9 L. R. A. 841; *Schmidt v. Iowa K. P. Ins. Asso.* 82 Iowa, 304, 47 N. W. 1032; *Carpenter v. Knapp,* 101 Iowa, 712, 70 N. W. 764. We must hold that the beneficiary was effectually changed from the estate of the deceased to the plaintiff.

By the Court.—The judgment of the circuit court is affirmed.

Wisconsin Farm Land Company, Appellant, vs. Bullard, Respondent.

September 29—October 20, 1903.

(1, 2) *Estoppel: Pleading: Evidence: Immaterial error.* (3, 4) *Special verdict: Review on appeal.* (5) *Real-estate brokers: Commissions: Sale by owner.*

1. Where an estoppel *in pais* was not pleaded, although there was ample opportunity to do so, evidence to establish such an estoppel is inadmissible.
2. Error in admitting evidence to show that plaintiff was estopped to insist upon a certain contract obligation is immaterial where the jury has found upon sufficient evidence that plaintiff released defendant from that obligation.
3. A special verdict is sufficient if it covers all the facts put in issue by the pleadings in respect to which the evidence is conflicting.
4. If a finding of the jury is supported by any credible evidence it must be regarded on appeal as a verity.
5. In an action by a real-estate broker to recover a commission on a sale of land made by the owner, the jury found that the plaintiff was the procuring cause of the sale, and also that plaintiff had released the defendant from the obligation to pay a commission in case he sold the land himself. *Held*, that the finding that plaintiff was the procuring cause meant no more than that plaintiff directed the attention of the purchaser to the land and that this was what led up to the sale; and that such fact did not entitle plaintiff to a commission, in view of the subsequent release which left defendant free to deal with such purchaser.

Appeal from a judgment of the circuit court for Clark county: James O'Neill, Circuit Judge. *Affirmed.*

Action upon a contract worded as follows:

"This agreement, made and entered into this 14th day of August, 1901, by and between the *Wisconsin Farm Land Co.*, of Neillsville, Wisconsin, and *Andrew Bullard*, Town of Weston of Clark Co., Wisconsin.

"Witnesseth: The said *Andrew Bullard* for and in consideration of the agreements hereinafter made, does hereby

appoint the said *Wisconsin Farm Land Company* his exclusive agents for the period of until the first of March from the date hereof, except as hereinafter provided, for the sale of the following described lands and properties.

"NE of NE, S. 24, Town 25, 3 W, Acres 40.

"SE of NE, S. 24, Town 25, 3 W, Acres 40.

"The price of said lands and properties shall be $4,500. And in case said lands and properties are sold, $500 shall be retained by the *Wisconsin Farm Land Co.* from the first cash payment, as payment for their services in effecting such sale, and expenses incurred by them in advertising said property, or showing same to prospective buyers. Said sum of $500 shall be in full payment for all services and expenses of said *Wisconsin Farm Land Co.* and no further demand for such services or expense shall be made. The said *A. J. Bullard* hereby reserves the right to, if possible, find a purchaser for, and make sale of the above described lands and properties at the said price of $4,500. And in case a purchaser for said properties is so found he hereby agrees to forthwith bring such purchaser to the office of the *Wisconsin Farm Land Co.* at Neillsville, where all papers of transfer shall be made and executed without cost; and shall pay the *Wisconsin Farm Land Co.* the sum of $500 as payment for expenses incurred by them in advertising of said properties and commission for the sale thereof. It is further agreed that in case no purchaser is found for said properties within the time specified, that the said *Wisconsin Farm Land Co.* shall make no charge for such services rendered or expenses incurred by them in their efforts to effect such sale; except where special expense is authorized and ordered by the said *A. J. Bullard* in which case such expense shall be borne by him whether the sale is effected or not.

"Signed and agreed to on the date first above written.

"WISCONSIN FARM LAND COMPANY,
"Per R. W. Canfield.

"A. J. BULLARD."

Plaintiff alleged in the complaint the making of such contract; that pursuant thereto it procured one Holtz as prospective purchaser to examine the land; that subsequently defendant, independently of plaintiff, contracted such land to

Holtz for $4,350, receiving $150 as a down payment; that later the contract was fully consummated, whereby plaintiff became entitled to the commission of $500 stipulated for. Defendant pleaded want of consideration to support the contract, and that he was released therefrom before the sale was made.

There was conflicting evidence upon three propositions, which were submitted to the jury for solution by special verdict. The result was as follows:

"1. Was the *Wisconsin Farm Land Company* the procuring cause of the purchase by Holtz of defendant's farm? *A.* Yes.

"2. Did the plaintiff by its agent Canfield, before the sale of the farm, release the defendant from the obligation to pay any commission in case defendant sold the farm himself? *A.* Yes.

"3. If you answer the last question 'Yes' then did defendant rely and act upon such release in selling to Holtz? *A.* Yes."

Plaintiff moved for judgment on the verdict, and defendant moved to change the answer to question No. 1 from "Yes" to "No" and for judgment. Both motions were denied. Judgment was thereafter ordered dismissing the complaint with costs.

For the appellant there was a brief by *Sturdevant & Clark,* and oral argument by *L. M. Sturdevant.*

For the respondent there was a brief by *Chas. F. Grow* and *J. R. & C. R. Sturdevant,* and oral argument by *Mr. Grow.* They argued, among other things, that plaintiff's exclusive agency did not prevent defendant from making the sale himself before plaintiff should do so, even if he had failed to reserve this right in the contract. *Dole v. Sherwood,* 41 Minn. 566, 16 Am. St. Rep. 731. Defendant could sell the farm at any time before learning that plaintiff had a purchaser for it at the stipulated price, without being liable to pay a commission. *Darrow v. Harlow,* 21 Wis. 302; *Frenzer v. Lee,* 90

N. W. 914; *McDonald v. Bæing,* 43 Mich. 394, 5 N. W. 439; *Baars v. Hyland,* 65 Minn. 150. The most that plaintiff did was to inform Holtz it had this land for sale, while showing him other lands and trying to sell him other farms. This would not make plaintiff the procuring cause of the sale by defendant. *Lawrence v. Weir,* 3 Colo. App. 401, 44 L. R. A. 335, note; *Comm. Nat. Bank v. Hawkins,* 35 Ill. App. 463; *Doonan v. Ives,* 73 Ga. 296, 301; *Ellsmore v. Gamble,* 62 Mich. 543, 547. Defendant had under the facts in this case the right to sell his farm for less than the price stipulated in the contract. *McArthur v. Slauson,* 53 Wis. 41. Unless plaintiff had found a purchaser ready to fulfill the contract and such a customer as defendant was bound to accept, it would not be entitled to any commission. *Fraser v. Wyckoff,* 63 N. Y. 445; *McArthur v. Slauson,* 53 Wis. 41. If plaintiff had negotiations with Holtz, but abandoned them without bringing him and the defendant together, defendant could afterward sell the farm to Holtz without being liable to plaintiff. *Wylie v. Marine Nat. Bank,* 61 N. Y. 415; *Frenzer v. Lee,* 90 N. W. 914; *Platt v. Johr,* 9 Ind. App. 58, 44 L. R. A. 343, note.

MARSHALL, J. Evidence was allowed against appellant's objection, to the effect that before making the contract of sale with Holtz respondent had a conversation with Canfield, appellant's managing agent, in which it was agreed that if respondent effected a sale of the land appellant would make no claim for commission under the contract; and that, relying thereon, respondent contracted with Holtz, making the price of the land to him $4,350. Error is assigned on that. The evidence seems to have been offered to establish an estoppel *in pais.* It was certainly not competent for any other purpose. As no such estoppel was pleaded and there was ample opportunity to do so, the evidence was irrelevant and should have been rejected. *Gill v. Rice,* 13 Wis. 549; *Warder v.*

Baldwin, 51 Wis. 450, 8 N. W. 257; *Gans v. St. Paul F. & M. Ins. Co.* 43 Wis. 108. However, the error was not prejudicial if the finding of the jury that respondent was released from his contract cannot be disturbed.

The point is made that the verdict did not dispose of all the issues, since it only covered the subject of whether respondent was released from his contract; that the evidence on one side was to the effect that there was an absolute release, and on the other that there was a conditional or partial release, hence that the questions should have been framed so as to require the jury to pass on whether there was an absolute or partial release. In that counsel falls into the common error of supposing that a special verdict should be framed to cover each particular matter of dispute between witnesses instead of facts in issue under the pleadings. The only proper test to which a special verdict should be subjected is the pleadings. If it covers all the facts therein put in issue, in respect to which the evidence is conflicting, it is sufficient. Such is the plain letter of the statute, sec. 2858, Stats. 1898. *Mauch v. Hartford,* 112 Wis. 40, 54, 87 N. W. 816; *Goesel v. Davis,* 100 Wis. 678, 76 N. W. 768; *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 313, 80 N. W. 644; *Cullen v. Hanisch,* 114 Wis. 24, 89 N. W. 900. The only issue raised by the pleadings on the subject of a release from the contract was whether respondent was wholly released. The form of the question submitted fitted that issue perfectly. If the attention of the jury had not been particularly called to the state of the evidence on the subject there would have been no reasonable probability of their rendering such a verdict as they did without coming to the conclusion that there was an absolute release as testified to by respondent. But the possibility of any mistake in that respect was effectually guarded against by the instruction given by the court to the effect that if the jury believed that there was but a partial or conditional release they should answer the question "No."

It is claimed that the finding of the jury as to appellant having released the contract is contrary to the weight of the evidence. That may be. If such be the fact it constitutes no ground for the reversal of the judgment. It is too familiar to warrant more than a mere reference to it, that if there is any credible evidence to support the finding of the jury their decision upon appeal must be regarded as a verity.

The further claim is made that, the jury having found that appellant was the procuring cause of the sale to Holtz, it was entitled to the commission stipulated for in the contract, as, according to respondent's own testimony, he was not to be deemed released except as regards a sale made by him; that the verdict that appellant was the procuring cause of the sale is wholly inconsistent with the view that respondent made the sale. We do not look at the findings of the jury and the evidence that way. The finding that appellant was a procuring cause of the sale obviously means no more than that it drew Holtz's attention to the farm, and that its act in that regard was what led up to the sale. That finding would have been fatal to respondent if the jury had decided that the release was conditional or partial, as appellant's evidence tended to prove. Having decided that the release was unconditional, the mere fact that appellant so interested Holtz in respondent's land that it led to his making a sale thereof, does not furnish appellant a ground of action. Notwithstanding it directed Holtz's attention to the land, it was perfectly competent for it to subsequently release respondent absolutely from his contract, leaving him free to deal with Holtz or any one else, as the jury found was done.

The foregoing leaves nothing more that need be said in disposing of this case. The judgment must be affirmed.

By the Court.—So ordered.

Barton, Respondent, vs. Bruley, Appellant.

September 29—October 20, 1903.

Assault: Evidence: Impeachment of witness: Marriage to daughter of party: Hearsay: Character of female as to chastity: Evidence of specific acts: Character of defendant: Proof of other assaults: Cross-examination: Misconduct of attorney: Instructions to jury.

1. It is never admissible to impeach a witness by showing contradictory statements out of court, having no relevancy to any of the issues.
2. The fact that a witness is married to the daughter of a party, if it may be shown as bearing upon his interest and impartiality, must be proved by direct evidence and not by mere hearsay or admissions of persons not parties to the action.
3. In an action by a female for an indecent assault upon her, evidence of specific acts to show her bad character as to chastity cannot go beyond acts of lewdness which quite necessarily evince looseness in sexual morals; hence, in such a case, evidence that on certain occasions she had purchased beer was properly excluded.
4. The commission of one assault cannot be established by proof of the commission of others; and in a civil action for an indecent assault upon a female, the defendant's character is in no wise in issue.
5. Improper conduct of the plaintiff's attorney in an action for an indecent assault, in persistently putting questions to defendant, on cross-examination, as to prior assaults of a similar nature upon other females, obviously intended to lead the jury to believe that defendant was an habitual debaucher of women, and errors of the court in overruling objections to some of such questions, are *held* to render necessary a reversal of a judgment in favor of the plaintiff.
6. Instructions informing the jury that the evidence as to plaintiff's character and reputation for chastity was material as bearing upon the probability of an assault having been committed upon her, and impliedly excluding its relevancy upon the question of damages, are *held* open to criticism; but whether, in the absence of any request by counsel calling the trial court's attention to the defect or omission, a reversal should follow, is not determined.

APPEAL from a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Reversed.*

Action for damages for an assault. Plaintiff charged that on an occasion when she went to defendant's office to collect an order on him he seized her in his arms, kissed her, and solicited sexual intercourse, which was refused, and that, after obtaining the money for which she went, she departed. Defendant denied everything of the transaction except her coming to his office and collecting the money. There were no other witnesses of the transaction. Considerable testimony was introduced impeaching plaintiff's reputation both for morality and chastity and for veracity. The jury returned a verdict of $500 compensatory damages and $1,000 punitory damages, which latter element was cut down by the trial court to $100, and plaintiff required to remit the excess, which she did. From judgment for the remaining $600, defendant appeals.

For the appellant there was a brief by *Chas. F. Grow* and *J. R. & C. R. Sturdevant,* and oral argument by *Mr. Grow.*

Dayton E. Cook, for the respondent.

DODGE, J. 1. The first error is assigned upon the exclusion of certain evidence. A witness (H.), having testified for the plaintiff, was asked, both to affect his credibility and show interest, whether he was not married to the plaintiff's daughter, and on denial was asked whether he had not stated to one Cunningham that he was so married. Defendant offered to prove by Cunningham that H. did state to him that he was married to plaintiff's daughter, which was excluded. In this ruling there was no error. The testimony of Cunningham was not admissible as impeaching evidence purely, for it is never admissible to attempt to impeach a witness by showing contradictory statements out of court, having no relevancy to any of the issues in the case. 3 Jones, Ev. § 847; *Kaime v. Omro,* 49 Wis. 371, 373, 5 N. W. 838. This is on

the principle that the jury are not at liberty to reject the evidence of a witness because he may have wilfully sworn falsely, unless such wilful false swearing were to some fact material to the issues on trial. Neither could the evidence be admissible to prove the fact of marriage, although that fact might have borne upon the witness's interest and impartiality. If the fact of marriage might be proved for that purpose—as, indeed, the court ruled it might—it must be proved by direct evidence, and not by mere hearsay or admissions of those not parties to the action. Defendant could no more prove this fact by hearsay than any other.

2. Defendant made two offers by different witnesses to prove that on certain occasions plaintiff had purchased beer. The admissibility of such evidence is now asserted as tending to show bad character of plaintiff. The court allowed her character to be attacked upon the subject of morality and chastity, both by proof of reputation and by any specific acts of unchastity or lewd conduct, but ruled that the purchase of beer was too remote. In this respect we think the court was right. While, perhaps, it may be legitimately argued that women of loose morals and promiscuous habits with men are frequently addicted to the use of intoxicants, the converse is not necessarily true—that the purchase, or even the use, of intoxicating liquors, is proof of immorality in other directions. Such acts, to say the worst, are ambiguous, and the line of demarcation between them and quarrelsome habits, use of vituperative language, and many other acts even less suggestive, could not be logically drawn. No case is cited to us which authorizes the idea that a plaintiff may be assailed in court by proof of every fact derogating from the highest degree of modesty of demeanor or propriety. The inquiry at the most cannot extend beyond acts of lewdness which quite necessarily evince looseness in sexual morals. *Ketchingman v. State,* 6 Wis. 426, 431; *Watry v. Ferber,* 18 Wis. 500; *Gulerette v. McKinley,* 27 Hun, 320.

3. The next error assigned is so closely associated with one of the grounds for the motion for new trial that the two can best be considered together. The defendant, upon cross-examination, was asked whether he had been divorced from his wife, which, being objected to, was withdrawn; but another question was put, so worded as to bring out the fact of a prior divorce. That was followed by the question: "Have you ever committed an assault of this kind before?" which being answered "No, sir," a motion was made to strike it out, and overruled by the court. Another question: "Did you, somewhere in the neighborhood of ten years ago, make an assault of the character of the assault here on —— on the streets of Neillsville?" Objected to for the reason, stated by the court, that "ten years ago is very remote." Again: "*Q.* Did you, some few years ago, while you were not living with your wife, make an indecent assault upon a Mrs. —— in your own store, and keep her in your back room all night?" Answered, "No, sir;" the court declining to rule. Again: "*Q.* Can you explain the reason why that night after night, after dark, during the time you were there in Cadott, and immediately preceding the time of this alleged assault, you were seen coming from your office after dark on one road and a woman coming down another road from the direction of your office at the same time?" An objection was sustained because not cross-examination, and because the defendant's character was not in issue. Again: "*Q.* As a matter of fact, it has been your practice, has it not, *Mr. Bruley,* for the past three or four years, to insult and make indecent proposals to every woman where an opportunity was presented? Is that not a fact?" Objection overruled. Answered, "No." "*Q.* How many times have the police force of the city been called down to your house here in the last two years to protect your family against your assault?" to which objection was sustained. Nothing is better settled than that the commission of one assault cannot be established by commission of others, and that

in a civil action for an assault such as this the defendant's character is in no wise in issue. *Fossdahl v. State,* 89 Wis. 482, 62 N. W. 185; *Paulson v. State,* 118 Wis. 89, 98, 94 N. W. 771, 774; 1 Jones, Ev. § 147. On the other hand, no irrelevant fact is more likely to have weight with the ordinary jury than that the accused has done similar acts on other occasions. See *Paulson v. State, supra.* Now, upon the trial under consideration, obviously this rule of law was ignored twice by the court in specific overruling of objections to such questions. This error must reverse, unless we can say with reasonable certainty that it could not have worked prejudice. Were there a single question, although bordering on this forbidden territory, which might have been asked in good faith, and as to which the court might merely have made a mistaken ruling, we might think that the negative answer of the witness was enough to exclude the probability of prejudice; but the conduct here of the plaintiff's attorney was such as to exclude any palliation of this error of the court, or to permit us to do otherwise than condemn most distinctly that conduct. Here question after question was put by that attorney which of course he knew, if answered at all, would be answered in the negative, and some of which were so vague and indefinite as to make certain that he had no expectation of proving any such fact, even if he might have hoped that the trial court would permit him to attempt it. But one inference is warranted by such conduct, and that is that the plaintiff's attorney was seeking to insidiously propagate in the minds of the jury a belief that such facts did exist and might be proved but for technical legal objections, and to gain benefit from the suspicion and the antagonism toward the defendant likely to arise from a belief that he was an habitual debaucher of women. Such conduct is not worthy of members of a profession devoted by their oaths, if by no other restriction, to aiding courts in promotion of justice. It never should pass without condemnation and disapproval, though not always

is its effect so obvious as to make necessary reversals of judgment. Similar conduct has been characterized by this court in no uncertain terms in *Buel v. State,* 104 Wis. 132, 135, 80 N. W. 78; *McNamara v. McNamara,* 108 Wis. 613, 84 N. W. 901; *Goodwin v. State,* 114 Wis. 318, 323, 90 N. W. 170. Under the rule of such cases, we cannot sustain a judgment founded upon a verdict which may well have resulted from such misconduct of counsel and erroneous rulings of the trial court as here described.

4. Error is assigned upon certain instructions which substantially informed the jury that plaintiff's character and reputation for chastity were material as bearing upon the probability of the assault being committed upon her. It is not contended that there is any error in what was said, but that the emphasis of the materiality of such evidence to one point impliedly excluded its relevancy upon any other; and it is now urged that it was also material as bearing upon the question of damages. This contention is undoubtedly well founded. *B—— v. I——,* 22 Wis. 372; *Plummer v. Johnsen,* 70 Wis. 131, 35 N. W. 334; *Candrian v. Miller,* 98 Wis. 164, 73 N. W. 1004. We shall not, however, deem it necessary to decide whether the omission of this further idea, in absence of any request by appellant's attorney to challenge the court's attention thereto at a time when it might have been corrected, would of itself work a reversal, since that result follows from other grounds. We agree with counsel for appellant that an omission did occur, which doubtless will not be the case upon another trial. It is, however, due to the trial court that counsel should promptly make known any desire for further amplification upon any subject. Indeed, it has been said that his failure to do so will be construed into such a waiver that he cannot upon appeal be heard to assign error.

5. Error is assigned for the failure of the court to set aside the verdict for want of evidence to support it, amongst other

things. This we cannot sustain. The plaintiff and defendant were squarely antagonized to each other as to the principal event, and while other circumstances as well as impeaching evidence might well have warranted the jury in discrediting, in whole or in part, plaintiff's testimony, still that was distinctly a question within the jury's province, and we cannot say that discretion was abused by the trial court in refusing to set aside their conclusion thereon. The court should, however, upon the motion to set aside the verdict, have considered the misconduct of plaintiff's attorney in cross-examination of the defendant hereinabove referred to, and on that ground have awarded a new trial. That conduct went not only to questions of damages, wherein it might well have been inflammatory, but also to vilification of the defendant, and must have aided to discredit his testimony before the jury.

By the Court.—Judgment reversed, and cause remanded for a new trial.

HINE, Appellant, vs. GRANT, imp., Respondent.

September 30—October 20, 1903.

Action: Dismissal for want of prosecution: Reinstatement: Discretion: Abuse: Showing of merits.

1. After the dismissal of an action had been ordered, under sec. 2811*a*, Stats. 1898, because it had not been brought to trial within five years after its commencement, it was an abuse of discretion to refuse to vacate such order when it was shown that plaintiff's attorneys agreed to a continuance over the last term within the five-year limit at the request and for the convenience of defendant's counsel; that counsel on both sides agreed to place the case on the calendar of the first term beyond the five-year limit; and that plaintiff's counsel thereafter consented to continuance over that term to accommodate defendant's counsel, but had duly noticed the case for trial at the next following term.
2. No showing of merits in such a case was necessary, other than the verified complaint stating a cause of action.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

This is an action upon promissory notes, which was commenced by the service of summons July 5, 1897, the complaint being duly verified. The defendant *Grant* appeared and answered October 2, 1897, setting up various defenses, which are not necessary to be stated. On the 7th of March, 1903, an order was made by the circuit court, without notice, ordering judgment of dismissal of the complaint, the same being based upon an affidavit of J. V. Quarles, Jr., one of the defendant's attorneys, stating the date of the service of the summons and the date of the joining of issue, and that the action had not been brought to trial, and that it had been more than five years since its commencement. On the 9th day of March following a motion was made by the plaintiff to vacate the said order of dismissal, which motion was based upon the record and the affidavit of Charles Canright, one of the attorneys for the plaintiff, in which he stated that he

"has had personal charge of said action from its beginning up to the present time; that Quarles, Spence & Quarles are the attorneys for the defendant *Emory L. Grant,* and that Senator J. V. Quarles has had personal charge of the matter for said defendant's attorneys; that said action was begun on the 14th day of July, 1897, in the superior court of Milwaukee county, and thereafter transferred to the circuit court of Kenosha county; that issue in said action was joined on the 2d day of October, 1897; that on the 4th day of August, 1898, said action was noticed for trial, which notice was filed with the clerk of this court in time for the case to be placed on the term calendar for the September term following; that shortly thereafter negotiations were entered into between the attorneys in said action for a settlement thereof; that said plaintiff is a resident of the state of California, and said negotiations occupied a period of several months; that the offer of settlement suggested by said defendant was finally refused by said plaintiff, and the trial of said action was thereby delayed until the close of the year 1901; that thereafter Senator Quarles advised plaintiff's attorneys that he

would be unable to take up said action at the March, 1902, term of said court, and at his request, on the 21st day of February, 1902, a stipulation was entered into between the attorneys herein, by which it was agreed that said action should be continued for the March, 1902, term, and placed on the calendar for trial at the September, 1902, term, and not prior thereto; that said stipulation was duly filed with the clerk of this court; that thereafter and a few weeks prior to the September term of said court, Senator Quarles again advised plaintiff's attorneys that he could not take up said action for trial at the September, 1902, term, as he was about to go to Alaska, and asked that said action be permitted to go over until some later date, to which plaintiff's attorneys consented; that notice of trial was served upon defendant's attorneys for the present March term of said court, this being the first term following the September, 1902, term; that upon filing said notice with the clerk of this court said clerk notified plaintiff's attorneys that an order had been filed by defendant's attorneys dismissing said action for the reason that same had not been brought to trial within five years from the date of joining issue; that the procuring and filing of said order was a great surprise to plaintiff's attorneys, and without their knowledge or consent; that the reasons why said action has not been brought to trial are set forth in this affidavit, and affiant asks that said action be reinstated and placed on the calendar for trial on the regular order of the business of this court."

This motion was heard March 16th, and upon the hearing thereof J. V. Quarles, Jr., filed an affidavit stating that

"for the space of two years and more last past he has had personal charge of the above-entitled action; that all of the negotiations which have taken place in the above-entitled action within said period of time have taken place between this affiant, representing *Emory L. Grant*, and Charles E. Canright, representing said plaintiff, to the best of this affiant's knowledge and belief; that the stipulation of continuance for the term referred to in the affidavit of said Charles E. Canright was entered into and signed by this affiant."

After hearing, the court denied the motion and entered judgment of dismissal, from which the plaintiff appeals.

For the appellant there was a brief by *Nath. Pereles & Sons,* and oral argument by *C. F. Hunter.*

For the respondent there was a brief by *Quarles, Spence & Quarles,* and oral argument by *J. V. Quarles, Jr.*

WINSLOW, J. It seems very plain that upon the showing made the trial court should have vacated the order of dismissal. Our statute (sec. 2811*a*, Stats. 1898) provides that circuit or superior courts may dismiss, with or without notice, all actions or proceedings pending in which issue has been joined and which are not brought to trial within five years after their commencement. Sec. 2832 of the same statutes provides that the court or judge may in discretion, and upon just terms, and within a year after notice, relieve a party from any judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect.

The order of dismissal was properly made under the first section cited. All the facts required by the section then appeared without dispute. It appeared to be a case of sheer and inexcusable neglect. But when the application to vacate the order was made other facts appeared, which were undisputed and very persuasive. These facts were that the action was noticed for trial in August, 1898, and that negotiations for settlement were then entered into which lasted for several months; that in February, 1902, on request of one of the defendant's attorneys, a written stipulation was made, continuing the case over the then approaching March term, and placing it on the calendar for the September term; that at some time prior to the last-named term, the plaintiff's attorneys, upon request of one of the defendant's attorneys, consented that the case might go over that term; and that the plaintiff's attorneys duly noticed it for trial at the March term, which was the next term following the September term. The March term, 1902, was within the five-year limit; the September

term, 1902, and the March term, 1903, were beyond the limit. Thus it appears that the plaintiff's attorneys agreed to a continuance over the last term within the five-year limit at the request of and for the convenience of the defendant's counsel; that counsel on both sides agreed to place the case on the calendar of the first term beyond the five-year limit, and that plaintiff's counsel consented to continuance over that term to accommodate defendant's counsel. These facts can leave no reasonable doubt as to the plaintiff's right to be relieved from the order of dismissal. The statute referred to (sec. 2811*a*) was passed to punish the suitor who sleeps away his day in court, and give trial courts a certain and speedy means of clearing the records of mere deadwood, not to turn out of court a suitor who, though ready to proceed seasonably, has consented to delay in order to accommodate opposing counsel, as was shown to be the case here. This proposition seems too plain for extended discussion. The complaint was duly verified, and stated a cause of action. No further showing of merits was necessary. The court abused its discretion in not vacating its order of dismissal.

By the Court.—Judgment reversed, and action remanded with directions to grant the plaintiff's motion to vacate the order of dismissal upon such terms as may be just, and for further proceedings according to law.

SMITH, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

September 30—October 20, 1903.

(1) *Street railways: Injury to passenger: Proof of specific negligence: Court and jury.* (2) *Judgments: Vacation at same term.*

1. In an action against a street railway company for injuries sustained by reason of the derailment of the car in which plaintiff was riding, evidence proving or tending to prove that at

the place in question there was a curve in the track; that crushed stone had been deposited by defendant along and upon the rails; and that the car was being run at a speed of from twelve to twenty miles an hour, regardless of those conditions and in violation of a city ordinance,—is *held* sufficient to make it a question for the jury whether the accident was caused by defendant's negligence in running the car at such speed and in permitting the track to be in such faulty condition.

2. The circuit court has power, with or without a motion, to vacate, at any time during the same term, any order or judgment entered through mistake, inadvertence, or want of proper deliberation, even though such order or judgment is the result of a series of erroneous rulings; as, for instance, where the judgment to be vacated was entered pursuant to an order granting a nonsuit and a subsequent order denying a motion to vacate such nonsuit and for a new trial.

APPEAL from an order of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Action to recover for injuries received by plaintiff by the derailment of one of defendant's cars while she was a passenger thereon. The negligence complained of was running the car at a speed of eighteen to twenty miles an hour contrary to the ordinance of the city regulating the movement of cars, where the track was in a defective condition in that foreign material had been allowed by defendant to accumulate thereon and on the right of way. It was alleged that,

"The careless and negligent manner in which the car was run, namely, at its high and unlawful rate of speed, and the failure of the said company to maintain its equipment in a safe and prudent manner, were the proximate causes of said plaintiff's injury."

The defendant answered admitting that its car was derailed at the time alleged in the complaint, and that plaintiff was a passenger thereon, and alleged that the derailment was caused by the malicious and wanton obstruction of its track by persons not in its employ or in any manner connected with the

defendant and for whose conduct it was in no sense answerable.

There was evidence proving or tending to prove that plaintiff was injured by the derailment of the car; that at the time thereof the car was going at a speed of from twelve to twenty miles an hour and faster than the ordinance of the city permitted; that a large amount of crushed stone had been deposited by defendant between, along, and upon its tracks, and that there was a curve in the track where the car left the same. There was no other proof of how the accident was produced.

At the close of plaintiff's case a motion for nonsuit was granted. Subsequently plaintiff moved the court to vacate the nonsuit and for a new trial, which, after due deliberation, was denied. Judgment was rendered accordingly. Thereafter, before the close of the term, without notice to the parties or their attorneys, the judgment and the previous orders were vacated and a new trial granted. Defendant appealed.

For the appellant there was a brief by *Kearney, Thompson & Myers,* attorneys, and *Spooner & Rosecrantz,* of counsel, and oral argument by *Clarke M. Rosecrantz.*

For the respondent there was a brief by *John W. Owen,* attorney, and *Wallace Ingalls,* of counsel, and oral argument by *Mr. Ingalls.*

Marshall, J. The first proposition of appellant's counsel is stated by them thus:

"The nonsuit was not erroneous, the plaintiff having alleged specific negligence as the cause of the accident, was bound to show such negligence, and that the accident was caused thereby. This she failed to do."

From the argument of this branch of the case we gather the idea that counsel supposed that to warrant the jury in finding that the negligence complained of caused the derailment of

the car they must have some direct evidence on the subject; that otherwise they would be left to conjecture merely. There is probably no principle better understood than that issuable facts can be established by indirect as well as by direct evidence. If the circumstances of the accident in this case, as the jury had a right from the evidence to believe them to be, were such as to raise a reasonable inference that the derailment of the car was caused by the way it was operated, combined with the faulty condition of the track alleged, then a fair jury question in regard to the matter was presented. Now, notwithstanding the argument of counsel and the evident uncertainty the trial judge labored under on the subject, it seems that the evidence tended strongly to prove the acts of negligence alleged, and that they caused the derailment of the car. Such evidence was to the effect that where the accident occurred there was a curve in the track; that there was crushed rock upon the rails; and that the motorman operated the car at a speed of from twelve to twenty miles per hour regardless of those conditions. One, it seems, has but to apply common understanding to such a situation—a jury must necessarily be allowed to do that—to see that the derailment of the car was probably caused by its being run too fast in view of the curve in the track and the presence upon the rails of crushed rock, and that the motorman in charge of the car might well have expected, had he given any thought to the matter, that the car might go off the track as it did. It follows that the nonsuit was improperly granted, and that if the court had power to vacate it on its own motion, and grant a new trial, appellant has no good ground for complaint.

It is insisted that the rule that a court of record has control over its judgments and orders during the term in which they are rendered and may, with or without a motion therefor, vacate any such order or judgment if justice seems to require it, should not be extended to a judgment or order deliberately entered affirming a prior decision made during the term. If

there is any such limitation upon the rule we are not familiar with it. Counsel has not produced any authority that there is. This court, in common with others, has declared in the broadest language that a court possesses inherent authority to set aside any judgment or order entered by it through mistake, inadvertence, or want of proper deliberation at any time during the term, and need not wait to have such power put in motion by the request of an interested party before acting. *Brown v. Brown,* 53 Wis. 29, 9 N. W. 790; *Hansen v. Fish,* 27 Wis. 535. In the last case cited the court said: "There can be no doubt of the power of the court to set aside a judgment inadvertently ordered, at the same term at which the judgment was entered," and "that the court may exercise that power on its own motion." It would be a violent infraction of that to hold that if a judge erroneously enters an order through mistake, inadvertence, or want of proper deliberation, and follows it by a second order affirming the first, thereby repeating the error through want of proper consideration of the subject, he is then powerless to correct the mistake, however apparent the same may be. The full scope of the rule was indicated in *Brown v. Brown,* where it was said that, in the interests of justice, the judge should be allowed to vacate any order made by him through mistake, inadvertence, or want of deliberation, at any time during the term in which the error is committed. Obviously, it can make no difference with the application of that principle that the mistake to be corrected is the final one in a series of erroneous rulings.

By the Court.—The order is affirmed.

BOHN, Appellant, vs. CITY OF RACINE, Respondent.

September 30—October 20, 1903.

Municipal corporations: Injury from defective sidewalk: Contributory negligence: Refusal to set aside verdict: Appeal.

1. A decision of the trial court refusing to set aside a verdict or alter a finding therein as being unsupported by the evidence will not be disturbed on appeal unless clearly wrong.
2. Though a traveler on a sidewalk may have the right to assume that the walk is reasonably safe, it is his duty, nevertheless, to exercise ordinary care as he proceeds and to observe defects which are plainly visible. The fact that he is injured by such a defect is sufficient to rebut the presumption in his favor of due care, and to put upon him the burden of showing some excuse for not seeing the danger, such as a reasonable diversion of his attention at the instant of the injury.
3. In an action for injuries alleged to have been caused by a defective sidewalk, the evidence tended to show that, although the accident happened in the evening, the defect in question (caused by the laying of a new cement walk) was plainly visible at the time, and that plaintiff knew the new walk was being laid, having frequently and recently passed in plain view of the whole situation; and there was no evidence that his attention was diverted in any way at the time of the accident. *Held*, that the decision of the trial court refusing to set aside a verdict finding contributory negligence should not be disturbed.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Action to recover for personal injuries claimed to have been caused by the insufficiency of a sidewalk in the defendant city upon the east side of Villa street between Fourteenth and Fifteenth streets, about eighty feet north of the latter. The defect claimed consisted of an abrupt drop in the surface of the walk of about eight inches, created by the construction of a new cement walk, from Fifteenth street north to the point in question, higher than the surface from there on, which had been partly prepared for a continuance of the

cement walk. It was alleged that such condition existed prior to the accident for about two weeks.

The right to recover on most of the material points was put in issue by the answer. There was evidence tending to establish all the issues in plaintiff's favor. On the issue as to plaintiff's contributory negligence there was evidence to the following effect: Plaintiff, when injured, was about twenty-five years of age. He had always resided a distance of about two blocks from the scene of the accident. It occurred between 8 and 9 o'clock p. m., July 27, 1902. He had been out walking for pleasure since about 7 o'clock, traveling during the time a little less than two miles. He traveled continuously after starting till the accident occurred, except a momentary stop at a saloon. It was not very dark. As he walked south on the east side of Villa street where the surface had been prepared for putting in a cement walk, the old plank walk having been removed and the material lying about, when about eighty feet from Fifteenth street he reached the north end of a new cement walk that had been constructed north from Fifteenth street. The surface of such new walk was about eight inches higher than the footpath upon which he approached. Not noticing that fact he collided with the end of the new walk, and was thereby caused to fall forward onto the hard surface thereof, with the consequences for which he claimed compensation. Villa street was a much-used thoroughfare. Sidewalks had existed on both sides thereof for many years. Plaintiff was very familiar therewith. Though he had not traveled on such street for some time, he knew that work of laying cement walks had been there in progress for a considerable period. It was his custom to pass within sight of the walk where he was injured every working day as he went to and from his business. On such occasions he often traveled on Fifteenth street, passing within about eighty feet of the scene of the accident. He saw the walk in question as he passed along one of the streets inter-

secting Villa street earlier in the evening of the day he was injured. There was an arc light at the intersection of Villa and Fifteenth streets located sixteen or eighteen feet from the ground, and another at the intersection of Villa and Fourteenth streets. The bright surface of the cement walk, together with the lights from the crossings, made the walk quite prominent. There were trees on both sides of the walk, with foliage so near the surface as to cast shadows upon the walk and more or less intercept the rays of light from the crossing to the point where the accident occurred. There was no evidence tending to show that plaintiff could not have seen the raise in the walk had his attention been directed to the surface of the ground in front of him. There was no evidence that his attention was diverted in any way from the appearance of things in his pathway.

The jury found in favor of the defendant on the issue of plaintiff's contributory negligence, but found all others in plaintiff's favor. Plaintiff's counsel moved the court to change the unfavorable answer to one in favor of plaintiff, which was denied. Plaintiff's counsel moved further for judgment upon the verdict, which was denied. A further motion was made by plaintiff's counsel to set aside the verdict and grant a new trial, which was denied. Judgment was thereupon rendered for defendant, and plaintiff appealed.

Wallace Ingalls, for the appellant.

M. E. Walker, for the respondent.

MARSHALL, J. To the trial court there was presented for determination a question as to whether there was evidence susceptible of a reasonable inference that appellant, on the occasion of his injury, was guilty of contributory negligence. That question was deliberately decided in the affirmative. The effect of this appeal is to challenge that decision as one not only wrong, but clearly so. *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573; *Nicoud v. Wagner,* 106 Wis.

67, 72, 81 N. W. 999. As has often been said, in effect, if there is room for conflicting reasonable inferences on the record as it comes to us, as to whether there was or was not evidence tending to establish contributory negligence, a proper regard for the deliberate judgment of the circuit court should incline us to the view that it is right.

A study of the evidence in the light of the legal principle applicable thereto does not leave the mind free from reasonable doubts but that it is susceptible of conflicting reasonable inferences as to appellant's contributory fault. True, he had a right to assume, in the absence of knowledge to the contrary or any circumstance reasonably sufficient to put him on his guard, that the walk was reasonably safe; but, just as true, it was his duty to exercise ordinary care with his eyes as well as his feet, as he proceeded, and to observe those things affecting his personal safety which were open and obvious to ordinary attention to his surroundings. In many sidewalk cases that might be cited the plaintiff was held guilty of contributory negligence because when he was injured the defect could easily have been seen by him had he observed, as persons ordinarily do, his pathway as he proceeded, and there was no evidence that his attention was for the moment diverted. *Robb v. Connellsville,* 137 Pa. St. 42, 20 Atl. 564; *Shallcross v. Philadelphia,* 187 Pa. St. 143, 40 Atl. 818. In a late work treating on this subject the law is stated thus:

"A traveler is not bound to give his whole attention to the highway over which he is passing, nor to keep his eyes constantly fixed upon the pavement or roadbed, watching for defects; nor need he look far ahead for defects or obstructions. Hence if, while his attention is momentarily diverted, he falls into an excavation or runs against an obstruction, the presence of which was not known to him, he is not necessarily, as a matter of law, guilty of contributory negligence, and that, too, even though such accident happens in broad daylight." Williams, Municipal Liability for Tort, § 128.

That is well supported by the authorities cited. It suggests, as will be seen, that in the circumstances stated the fact that the defect is easily observable by the ordinary use of the traveler's eyes as he proceeds is sufficient to carry the case to the jury on the issue of contributory negligence. That is because of the opportunity for reasonable controversy as to whether there was reasonable diversion of attention. When a defect in a walk is in plain sight of the traveler, and yet he is injured by it, that is sufficient to rebut the legal presumption in his favor of due care, and call upon him to show some reasonable excuse for not seeing the danger, substantially the same as if he knew of the defect. *Crites v. New Richmond,* 98 Wis. 55, 73 N. W. 322; *Collins v. Janesville,* 111 Wis. 348, 87 N. W. 241, 1087. Of course, he is not absolutely bound to see defects that are observable by looking, any more than he is bound to remember a defect of which he has knowledge. But he is called upon in both cases to show some reasonable diversion of attention at the instant of the injury, and that is rarely accomplished with such clearness as to take the issue in regard to the matter from the jury.

Applying the foregoing to the record before us, a decision is not difficult to reach. By the aid of the photographs it seems that the jury might reasonably have come to the conclusion that the defect in question was so prominent that appellant could readily have seen it had he been looking at or paying any attention to the walk in front of him. Respondent's attorney seems rather to concede that, in the absence of evidence showing that it was dark and that by reason of dense foliage on the shade trees at the sides of the walk, rays of light from the electric lamps at the crossings did not reach the place of the accident, the obstruction could easily have been seen by appellant. But the evidence is by no means either conclusive that it was so dark that without artificial light the obstruction was not observable by ordinary atten-

tion, or that there was no artificial light effectual to dispel the darkness if that condition existed. The jury may well have come to the conclusion from the evidence that the accident happened soon after 8 o'clock. Appellant started out on his pleasure walk at 7 p. m. Traveling continuously except for a momentary stop at a saloon, he proceeded about two miles before the accident occurred. A person would go that distence at a very slow walk in an hour. On July 27, 1902, the sun did not set till about half past seven. So it will be seen that there is ground for believing that there was a sufficient degree of twilight when the accident occurred to enable appellant to easily see the end of the walk as he approached it, if he had been paying any attention to his pathway. But, assume that such was not the case,—there is considerable evidence that the street lights at the crossings made the end of the walk a conspicuous object, either by the rays of light reaching the point directly or being reflected thereto from surrounding objects. The pathway upon which appellant approached the cement walk was black. The surface of the cement walk was white. The contrast between the two surfaces was so great that the jury might very reasonably have come to the conclusion that there was sufficient light to render the end of the cement walk plainly visible. In addition to all this there is an entire absence of evidence that appellant's attention was diverted in any way, while there is much evidence that he knew quite well the fact that the work of putting down new cement walks on the street had been in progress for a long time, that a new walk had been partly laid between Fourteenth and Fifteenth streets commencing at Fifteenth street, upon which he was traveling, and that he must necessarily reach it before arriving at Fifteenth street. He had passed in plain view of the whole situation many times prior to the accident, the last time being on the day of the occurrence. In view of all we have detailed, it would seem that the trial court had good ground for holding that

there was evidence in the case tending to prove that appellant heedlessly walked into the danger, and that his fault in so doing contributed proximately to the result for which compensation was sought.

It must be remembered that the issue of contributory negligence is peculiarly one for the jury; that is, that the cases are exceptional where it can be said as a matter of law either that the plaintiff was or was not guilty of contributory fault. There are a few exceptions where rules of law supply a certain test; but, generally speaking, the test is the judgment of the jury, from their conception of what ordinary care would require under the same or similar circumstances. So, it is generally difficult to determine whether, from any given state of facts, reasonable conflicting inferences of fact can or cannot be drawn. We are not prepared to say that the effect of the trial judge's decision in this case need be taken account of in coming to a conclusion that the judgment should be affirmed; but if we were to arrive at that point, certainly there is sufficient doubt as to the right of the matter that such decision should be deemed controlling.

By the Court.—The judgment is affirmed.

PERELES and another, Executors, Respondents, vs. LEISER, Executor, imp., Appellant.

September 30—October 20, 1903.

Appeal: Who may take: Mortgages: Foreclosure: Judgment for deficiency against personal representative of mortgagor: Failure to present claim against estate.

1. A foreclosure judgment, entered by default, ordered that plaintiff have judgment for any deficiency against the executor of the will of the mortgagor. Immediately after the foreclosure sale, said executor appeared and prayed that said order for judgment for deficiency be held inoperative, on the ground

that there was no personal liability on the mortgage note at the time of the commencement of the action. The court ordered the judgment for deficiency to be entered. *Held*, that the executor was entitled to appeal from such order and judgment.

2. If no claim based upon a note secured by mortgage is presented against the estate of the deceased maker within the time limited for such presentation under sec. 3844, Stats. 1898, personal liability on the note is extinguished, and a subsequent judgment for deficiency against the executor of the deceased maker is erroneous.

Appeal from an order and a judgment of the superior court of Milwaukee county: Orren T. Williams, Judge. *Reversed.*

An action by respondents' testator, commenced on August 24, 1900, to foreclose a real estate mortgage executed by Sarah Leiser, deceased, on or about the 15th day of April, 1892. The debt secured was evidenced by a note of the same date, due three years thereafter. The plaintiff became the owner of the note and mortgage, for a valuable consideration, on the 30th day of June, 1900. No part of the principal sum has ever been paid on this note, and this action is brought to foreclose the mortgage and to collect the principal and the interest due.

Sarah Leiser, deceased, was a married woman when the note and mortgage were given, and owned the real estate, which she mortgaged as a part of her separate estate. She died in the city of Milwaukee, June 16, 1895, leaving a will, which was probated September 14, 1895. Letters testamentary were issued to *Isidor Leiser,* the executor named in the will, who qualified, and is now the executor. The county court of Milwaukee county made an order limiting the time for presenting and filing claims against the estate of the deceased, and directed notice to be given to creditors, as required by law, requiring all creditors to file their claims on or before the second Tuesday of April, 1896. The estate of the deceased included the premises mortgaged to secure this

debt. Thereafter the executor conveyed the premises to one William J. Allen, and he conveyed them, subject to this mortgage, to one George Chrest, a defendant in this action. It appears that Francesca Stroeble was the owner and holder of the note and mortgage from November 2, 1892, until she sold and assigned them to the respondents' testator. This note was due at the time of the death of Sarah Leiser, and was not presented or filed as a claim against her estate.

Plaintiff was awarded judgment for the amount due, with interest, and foreclosure and sale of the premises, and to have judgment for any deficiency against *Isidor Leiser,* as executor of the last will and testament of Sarah Leiser, deceased, and the deficiency was made a charge upon, and to be collected out of, her estate. Eaton & Bolzendahl served notice of retainer as attorneys for the executor November 23, 1901, and filed the petition of the executor, praying, in effect, that the part of the judgment ordering judgment for deficiency should be held inoperative. The sheriff's report of sale was made November 18, 1901, and the proceedings thereon and the executor's petition were heard by the court January 6, 1902. In this proceeding the court approved the sheriff's report, and directed that judgment for a deficiency be entered, as awarded in the foreclosure judgment, for the deficiency specified in the sheriff's report. This is an appeal from that part of the judgment of foreclosure which orders judgment for the deficiency and the order directing the amount to be entered as such deficiency.

The plaintiff having died while the cause was pending in this court, the action was revived in the name of his executors as respondents.

H. L. Eaton, for the appellant.

W. O. Thomas, for the respondents, contended that it was not necessary to file the note and mortgage as a claim against the estate. (1) The mortgagee had no standing in the county court, and that court could not give any adequate relief.

Gianella v. Bigelow, 96 Wis. 185; *Lannon v. Hackett,* 49 Wis. 261; *Gager v. Paul,* 111 Wis. 646; *Crow v. Day,* 69 Wis. 637; *Mann v. Everts,* 64 Wis. 377; *South Milwaukee Co. v. Murphy,* 112 Wis. 614. (2) The practice in a case like this is to wait until a deficiency judgment is ordered, and have it certified to the county court. *Reinig v. Hecht,* 58 Wis. 212; *Gianella v. Bigelow,* 96 Wis. 185–201. (3) A deficiency judgment so certified stands as an allowed claim against the estate. *Reinig v. Hartman,* 69 Wis. 28. (4) The judgment of foreclosure and sale is a final judgment, and any defense to the action should be made before and not after judgment. *Witter v. Neeves,* 78 Wis. 549; *Gaynor v. Blewett,* 86 Wis. 400; *Kane v. Williams,* 99 Wis. 72; *Tormey v. Gerhart,* 41 Wis. 58.

Siebecker, J. Appellant appeared by counsel in this action November 23, 1901, immediately after the sale of the premises under the foreclosure judgment. He moved upon the record, proceedings, and by petition that the order in the judgment for a judgment of deficiency be disregarded, on the ground that no personal liability existed on the note at the time of the commencement of this action, and that the order in the foreclosure judgment for a judgment for any deficiency should therefore be disregarded and treated as of no effect. On January 6, 1902, after hearing plaintiff for the entry of a judgment for deficiency on the sheriff's report, and the appellant opposing such order and judgment because contrary to law, the court approved the sheriff's report, and ordered that judgment for a deficiency be entered, as awarded in the judgment, for the deficiency shown by the report of the sheriff.

It is contended that appellant cannot now avail himself of the error of the lower court in awarding judgment of deficiency. Respondents concede no claim was filed on the note against the estate of Sarah Leiser, deceased, and when this

action was commenced the time for filing claims against her estate had expired, and that the plaintiff, their testator, took his judgment of deficiency against appellant as executor of her estate under the judgment decreeing a foreclosure and awarding the entry of such a judgment. We can perceive no reason why appellant after such appearance and hearing in the matter cannot avail himself of the right to appeal from that part of the judgment of foreclosure awarded against him as executor, and the order directing the entry thereof, since such appeal has been taken within the time limited by statute after the entry of judgment.

The vital question on this appeal is, Was plaintiff entitled to recover on the note against the appellant as executor of this estate on August 24, 1900, when this action was commenced which resulted in this judgment of foreclosure and for deficiency in plaintiff's favor. Sec. 3844, Stats. 1898, provides:

"Every person having a claim against a deceased person, proper to be allowed by the court who shall not after notice given as required by section 3840 exhibit his claim to the court within the time limited for that purpose, shall be forever barred from recovering such demand or from setting off the same in any action whatever."

It was held, under this statute, that all claims against a decedent which can properly be presented against his estate must be filed for allowance with the county court upon due notice, and all claims not presented as required by sec. 3844 are absolutely barred, and thereby the remedy is cut off and the right of action is extinguished. *Carpenter v. Murphey,* 57 Wis. 541, 15 N. W. 798; *Winter v. Winter,* 101 Wis. 494, 77 N. W. 883. In *Eingartner v. Illinois S. Co.* 103 Wis. 373, 79 N. W. 433, this court approved the doctrine as stated in *Woodman v. Fulton,* 47 Miss. 682, "that the bar created by the statute of limitation is as effectual as payment or any other defense, and when once vested cannot be taken away

by legislative action without the defendant's consent." In this case the limitation for exhibiting a claim on this note against the estate of Sarah Leiser, deceased, had run against it before this action was commenced. Hence, there can be no judgment over for any deficiency against the appellant as the executor of her estate. The question is well settled under repeated decisions in this state, which declare, in positive terms, that after such an extinguishment of a claim no foundation for a personal judgment remains on the note, though the right to a judgment of foreclosure of the mortgage to enforce the lien still existed, and therefore "the power to render a personal judgment in the foreclosure action cannot be exercised, because there is no longer any one personally liable to satisfy the conditions of the statute." *Duecker v. Goeres,* 104 Wis. 29, 80 N. W. 91.

The judgment of deficiency was without authority and therefore erroneous.

By the Court.—The order directing the entry of a personal judgment against *Isidor Leiser,* as executor of the last will and testament of Sarah Leiser, deceased, and making it a charge upon her estate, and the part of the judgment appealed from, are reversed.

HANLEY, Appellant, vs. KRAFTCZYK, Respondent.

September 30—October 20, 1903.

Wills: Probate: Prior application as a bar: Limitations: Who may apply for probate: Grantee of devisee: Mistake in description of land: Evidence: Due execution: Mental capacity: Appeal from county court: Dismissal for delay in transmitting papers.

1. Failure of the county court to act upon a petition for the probate of a will does not bar a subsequent application for probate.
2. Lapse of time is no bar to proceedings for probate of a will in order to establish title to real estate.

3. One claiming title by deed from the devisee of land has a right to apply for probate of the will.
4. One to whom land has been conveyed by the devisee and her husband is not estopped from claiming title under the will and such conveyance by the fact that the husband had, prior to the conveyance, obtained a tax deed of the land.
5. Refusal to dismiss an appeal duly taken from the county court, merely because the record and appeal papers were not transmitted to the circuit court within the time limited by sec. 4033, Stats. 1898, was not error, in view of the authority given by sec. 2831 to allow such transmission after the time so limited, especially where the motion to dismiss was not made until after the papers had been transmitted and was based solely on the ground that the appeal "was not taken in due time or according to the provisions of the statutes."
6. A devise of land described it as being in section 21 and bounded on one side by a certain railroad and on another by lands of certain persons. There was no land in section 21 so bounded; the testator never owned or occupied any land in that section; and the description was otherwise so indefinite and uncertain as not to apply to any specific land in that section. The testator did, however, own and occupy, at the time of his death, land in section 22, answering in all other respects to the description in the will. *Held*, that evidence of these facts was admissible and sustained a finding construing the will as devising the land in section 22.
7. The evidence in this case (stated in the opinion) is *held* to sustain findings of the trial court that a will was duly executed, and that the testator at the time was of sufficient mental capacity and free from undue influence.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This is an appeal from the judgment of the superior court of Milwaukee county reversing a judgment of the county court refusing to admit the will of James Hanley to probate, and remitting the cause to the county court with directions to admit the will to probate. It appears from the record and is undisputed, or found by the court, in effect, that the testator executed his last will and testament September 12, 1872, wherein and whereby he bequeathed to his son $100 and to his daughter $50, and devised certain real estate, therein de-

scribed, to his wife, Johanna, and named her therein as executrix of his will; that the testator died September 13, 1872; that November 30, 1872, the widow, Johanna, presented to the county court her verified petition, praying that such will be proved and admitted to probate. February 19, 1874, Johanna married Cyrus J. Dodge. November 9, 1881, Cyrus J. Dodge got a tax deed on the land so devised to Johanna. October 31, 1882, Cyrus J. Dodge and his wife, the said Johanna, conveyed the land so devised, by warranty deed, with full covenants, to the defendant in this action. January 18, 1899, the defendant in this action presented to the county court his petition stating the facts mentioned, and others, and praying that the will be proved and admitted to probate. Thereupon the plaintiff, claiming under the heirs at law, filed objections to such probate. October 4, 1899, and after proofs and hearing, the county court held that the defendant was estopped from claiming title under the will, and that the defendant had no interest in the estate of the testator which enabled him to apply for probate, and ordered and adjudged that such application be denied; and thereupon the defendant appealed therefrom to the circuit court.

April 21, 1900, the plaintiff moved the court to dismiss such appeal, which motion was denied by the circuit court, Judge Johnson presiding. The case was thereupon tried in that court before Judge Johnson, who on April 25, 1900, reversed such judgment of the county court, but Judge Johnson died before the entry of judgment. Thereupon the venue was changed by stipulation to the superior court, and the cause was re-tried in that court, and after such trial, and on July 9, 1901, that court made and filed findings of fact and conclusions of law, wherein it was found, as matters of fact, in addition to those stated, in effect, (4) that the will was duly executed; (5) that at the time of its execution the testator was of sufficient mental capacity to make a will; that no

undue influence was exercised by any person upon him to procure its execution; (7, 8, 9) that through mistake the premises devised were described as being in section 21 instead of section 22, which was the only section in which the testator owned any land; and that in that section he owned land which otherwise answered the description of the land devised, and upon which land the testator and his wife, Johanna, had their homestead at the time of the testator's death; and that Johanna continued to reside thereon until October 31, 1882, when she and her husband conveyed the same to this defendant, who thereupon entered into the possession of the premises so devised, and has continually occupied the same ever since, except portions thereof, which he has sold to other parties.

And as conclusions of law the court found that upon the death of the testator all his right, title, and interest in such premises vested in Johanna by virtue of the will; that the same passed from her to the defendant by virtue of the deed from her and her husband to him, mentioned, and that the defendant thereby acquired such interest in the premises as to enable him to apply for the probate of the will; that such application should be granted, and the will should be admitted to probate. And it was therein ordered that the judgment of the county denying the defendant's application for the probate of the will be, and the same was thereby, reversed; and it was further ordered that said will be admitted to probate, and that the matter be remitted to the county court with directions to admit the will to probate. From the judgment entered accordingly the plaintiff appeals.

For the appellant there was a brief by *Charles H. Phillips* and *Doerfler, McElroy & Eschweiler,* and oral argument by *F. C. Eschweiler* and *Mr. Phillips.*

For the respondent there was a brief by *La Boule & Hunt,* and oral argument by *F. S. Hunt.*

Cassoday, C. J. Numerous technical objections are raised to the proceedings. The testator died September 13, 1872, leaving a will in which he devised his homestead to his widow, Johanna. On the same day Johanna filed the will in the county court. Two and a half months afterwards she petitioned the county court to have the will proved and admitted to probate. At the time the testator died he and his wife, Johanna, were living upon the premises so devised; and she continued to live thereon, for a time as a widow, and subsequently with her second husband, until October 31, 1882, when she joined with her husband in conveying the same by warranty deed with full covenants to the defendant, and ever since that time the defendant has been in such possession.

1. It is claimed that the defendant has no interest in the proceedings nor standing in court. A will is a muniment of title, but in this state and some others, in order to "be effectual to pass either real or personal estate," it must be "duly proved and allowed in the county court." Sec. 2294, Stats. 1898. When so admitted to probate, it relates back to the time of the death of the testator, and is to be treated as speaking from that moment. *Flood v. Kerwin,* 113 Wis. 680, 89 N. W. 845, and cases there cited. There is no ground for claiming that the failure of the county court to act upon the petition of the widow, filed November 30, 1872, is a bar to the action taken in 1899. "A will devising lands may be admitted to probate at any time after the death of the testator." *Haddock v. B. & M. R. R.* 146 Mass. 155, 160, 15 N. E. 495. In that case the will was not admitted to probate until more than sixty years after the death of the testator. That case followed a former case, wherein it was said that, "if a will can be found, it may be proved in the probate office at any time, in order to establish a title to real estate." *Shumway v. Holbrook,* 1 Pick. 114, 117. So it has been held in that state that "whoever has a right to offer a will in evidence, or to make title under it, may insist on having it

proved." *Stebbins v. Lathrop,* 4 Pick. 33, 42. The defendant, claiming title by deed from the devisee named in the will and her husband, certainly had a right to insist on having the will admitted to probate. The fact that such husband had obtained a tax deed on the land did not estop the defendant from claiming title under the will and the conveyance from the devisee. The claim that the defendant is barred from insisting upon the probate of the will by reason of the statutes of limitation is without foundation.

2. Error is assigned because the court refused to dismiss the appeal from the order and judgment of the county court denying the defendant's application for the probate of the will. The statutes gave the defendant sixty days within which to appeal from such order and judgment. Secs. 4031–4033, Stats. 1898. It is conceded that the requisite notice was given, and the requisite undertaking was filed, and the order of the county court allowing the appeal was made within the time thus prescribed, and on or before December 1, 1899. The only objection is that the appeal papers and record were not filed in the circuit court until March 1, 1900. The last section of the statute cited required the county judge within twenty days after the appeal was taken to "file in the circuit court a certified copy of the record and proceedings appealed from, together with the notice of appeal and undertaking, and proof of service of the notice of appeal on the adverse party, according to the order of the county court." Sec. 4033, Stats. 1898. Should the appeal have been dismissed merely because the records and papers were not transmitted to the circuit court within the time required by that section? That court certainly had jurisdiction of the case by virtue of the appeal taken. *Congregation v. Hellstern,* 105 Wis. 632, 81 N. W. 988. The statute expressly authorized that court, in its discretion, and for good cause shown, and upon such terms as might be just, to allow such records and papers to be so transmitted to the circuit court "after the time limited"

therefor had expired. Sec. 2831, Stats. 1898. Motions are frequently made in this court to dismiss appeals on the ground that the records and papers have not been transmitted to this court within the time required. But such motions have generally been denied whenever the records and papers are here at the time of hearing the motion. In the case at bar the motion to dismiss the appeal was not made until a month after the records and papers had been filed in the circuit court. Besides, that motion was not made on the ground of such failure to so transmit the records and papers within the time required by statute, but solely on the ground that the appeal "was not taken in due time or according to the provisions of the statutes." The facts stated show that the ground upon which the motion was so based was without foundation. We find no error in refusing to dismiss the appeal.

3. Error is assigned because evidence was admitted to prove that by mistake the lands described in the will were in fact located in section 22 instead of section 21, as stated in the will. The description in the will of the lands so devised to the wife is as follows:

"A part of the southwest quarter bounded northeast by the railroad of the Milwaukee & St. Paul Co., west by Hapman and Harwood, being in section 21, town 7, range 21, containing 8 acres of land, being situated in the county of Milwaukee and state of Wisconsin."

The evidence showed, and the court found, in effect, that there were no lands so bounded in section 21, but that there were lands so bounded in section 22, and that the same were owned and occupied by the testator as his homestead at the time of his death; that the testator never owned or occupied any lands in section 21; and that there were no lands in that section which were bounded on the northeast by the railroad of the Milwaukee & St. Paul Company, and on the west by lands owned by Hapman and Harwood. Of course, it is incompetent for a court to reform a will by changing its lan-

guage or adding provisions not written therein, or to prove by extrinsic evidence some supposed intention not expressed in the will, nor fairly implied therefrom, when construed in the light of all surrounding circumstances. *Sherwood v. Sherwood,* 45 Wis. 357; *O'Hearn v. O'Hearn,* 114 Wis. 432, 90 N. W. 450, and cases there cited. But where there is a latent ambiguity in the language of the will, or the will contains inconsistent provisions, extrinsic evidence is admissible to enable the court to ascertain and give effect to the intention of the testator as expressed in the will, when read in the light of all the surrounding circumstances as they existed at the time the will was executed. *Morgan v. Burrows,* 45 Wis. 211; *Sherwood v. Sherwood,* 45 Wis. 357; *Scott v. Neeves,* 77 Wis. 312, 45 N. W. 421; *O'Hearn v. O'Hearn, supra.* A will or "deed with a description otherwise uncertain should be construed with reference to the actual rightful state of the property at the time of its execution, and extrinsic evidence of that state is admissible to aid in the construction." *Whitney v. Robinson,* 53 Wis. 309, 10 N. W. 512; *Docter v. Hellberg,* 65 Wis. 421, 27 N. W. 176; *Mills v. C. & N. W. R. Co.* 103 Wis. 199, 79 N. W. 245. Here the lands devised are described in the will as being bounded by three fixed and certain visible objects, to wit, the railroad, mentioned, on the northeast, and by Hapman and Harwood on the west. Such are the boundaries of the eight acres owned and occupied by the testator as a homestead at the time of his death. There were no lands answering such calls in section 21 at the time of the execution of the will, but there were such lands, then owned and occupied by the testator, answering such calls in section 22. The testator owned no lands in section 21, and the description in the will is so indefinite and uncertain as not to apply to any specific land in that section. Certainly the devise is not to be frustrated by the mere false statement that the lands are in section 21 instead of section 22. *Kennedy v. Knight,* 21 Wis. 340; *Du Pont v. Davis.* 30 Wis.

170; *Paine v. Benton,* 32 Wis. 491; *Sherwood v. Sherwood,* 45 Wis. 364; *Madison v. Mayers,* 97 Wis. 413, 414, 73 N. W. 43. We must hold that the findings of the court as to the description of the lands devised are supported by competent evidence.

4. It is strenuously contended that the findings of the court to the effect that the will was duly executed, and that the testator was at the time of sound mind and free from undue influence, are contrary to the clear preponderance of the evidence. The will purports to have been executed twenty-nine years before the trial. The man who drew it (Louis Hildebrand) was a justice of the peace when he drew the will, and was eighty years of age at the time of the trial. He testified to the effect that he knew the testator, and remembered having drawn a will at his house; that his recollection in respect to the will was pretty poor; that the will shown him was in his handwriting, and that he signed as a subscribing witness; that he could not tell at whose request he drew the will; that he went to the house at the request of the testator's wife; that the testator was sick at the time and said nothing; that he drew the will, and then read it to the testator, and explained it to him, and that the testator approved of it by bowing his head; that in his opinion the testator knew the business transacted; that he did not remember exactly what took place, except as he remembered his practice; that the writing was correct in every respect; that the attestation clause was correct, and states the facts that took place there at that time; that his daughter and her intended husband were also subscribing witnesses to the will; that he got the contents of the will from the testator's wife; that the testator was sick, and said nothing, and was an habitual drunkard. If there was no other evidence as to the execution of the will except what was remembered and testified to by Mr. Hildebrand, then there would be much force in the claim that the facts bring the case within the ruling of this court in *Will of Downing,*

118 Wis. 581, 95 N. W. 876. There is, however, this difference, that in that case there was an absence of the requisite facts as to the execution of the will, whereas here there is an absence of the memory of such facts by the particular witness named, and yet he testified that the attestation clause correctly states the facts that took place there at the time the will was executed. If that is true, then the instrument "was signed, published, and declared by the said testator to be his last will and testament, in the presence of" the three subscribing witnesses, who signed their names thereto "at his request, as witnesses, in his presence and in presence of each other." As recently held by this court, "the proper attestation of a will by witnesses raises a strong presumption of due execution, which can only be overcome by clear and convincing proof to the contrary." *In re Gillmor's Will,* 117 Wis. 302, 94 N. W. 32, and cases there cited. But it is unnecessary to rest upon such presumptions. The subscribing witness, Mrs. Amelie Voss Hinrichsen, testified to the effect that she went to the house of the testator with her father; that the testator told him that he was the one who wanted to make a will; that he said he had no objection to the three subscribing witnesses; that he wanted his wife to be his sole heir; that the will was drawn there in the presence of the testator; that the will was read to him before it was executed, and that the testator fully understood its contents; that in her opinion he was at the time of sound mind; that there was no influence used to induce him to make the will as he did, except, perhaps, her kindness to him; that, after the testator signed the will by making his mark, it was said in the presence of the testator that "we three should sign as witnesses, and we thereupon did sign our names" thereto as subscribing witnesses in the presence of the testator, who was "feeble, but perfectly conscious at the time." The other subscribing witness was seventy-three years of age, and had lost his eyesight and had poor memory; but, so far as he remembered the transaction,

he corroborated his wife. We must hold that the evidence is sufficient to sustain the findings of the court as to the due execution of the will, the mental capacity of the testator at the time of such execution, and that he was free from any undue influence at the time of such execution.

By the Court.—The judgment of the superior court of Milwaukee county is affirmed.

BARRY, Appellant, vs. THE ORDER OF THE CATHOLIC KNIGHTS OF WISCONSIN, Respondent.

October 1—October 20, 1903.

Benefit societies: Conditions of membership: Termination of liability if member ceases to be a Catholic: Public policy: Constitutional law.

1. By the articles of incorporation and the constitution of a benefit society organized for the sole benefit of members of the Roman Catholic Church, none but practical Catholics could be admitted, and members must remain practical Catholics and communicants of the church in order to participate in the benefits. In an application for membership (which became part of the insurance contract) the applicant agreed that upon any failure to conform strictly to the constitution he should forfeit all right to membership and benefits, and the certificate issued to him further provided that the death benefit should only be payable in case he should so conform. Afterwards the member was married by a Protestant minister and *ipso facto* was excommunicated and ceased to be a Catholic. *Held*, that all liability on the benefit certificate thereby ceased, the provisions of the contract being self-executing.
2. Membership in the society being purely voluntary, the provisions above mentioned, in its laws and contracts, were not contrary to public policy, and did not interfere with any rights of conscience or impose any religious test, within the meaning of secs. 18, 19, art. I, Const.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This is an action by the plaintiff, as widow of one James H. Barry, deceased, upon a mutual benefit certificate issued by the defendant to said James H. Barry in his lifetime.

The action was tried by the court, and the facts necessary to be stated are undisputed. The defendant is a mutual benefit association incorporated under the laws of Wisconsin for the benefit of practical Roman Catholics only, and providing the death benefit of $2,000. Its articles of incorporation provide, among other things, that:

"A member who shall cease to be a practical Catholic, or a communicant of said church, or who shall neglect to receive holy communion at least once a year, or who shall join any organization condemned by the church, or any society using the oath of secrecy, or who shall fail or neglect to pay any assessment or dues within the time therefor prescribed, shall be discharged and expelled from membership of this order, and deprived of all benefits thereof."

The constitution of the order provides, among other things, as follows:

"SEC. 2. No person shall be admitted to membership in this branch unless he is a practical Catholic, and a communicant of said church, nor unless he furnish a certificate from his pastor, or the spiritual director of the branch, that he is a practical Catholic. . . . He must receive holy communion at least once a year, at Easter or thereabouts, and he shall furnish and file with the branch a certificate from his pastor or furnish other satisfactory evidence within sixty days after Easter Sunday, certifying or showing that he performed his Easter duty, under penalty of forfeiture of all benefits. . . .

"SEC. 40. Any member in good standing shall be permitted to remove from this state to spend any or the whole part of his life elsewhere without losing his benefits, provided he keeps his assessments and his share of the expenses of the branch to which he may belong and the expenses of the order paid up as they may become due. He must also, in every respect, comply with the constitution, laws, rules and regulations of the order and furnish to the branch of which he is a member a certificate once a year from the pastor of the parish

in which he resides, that he is a communicant of said church, and that he has received holy communion at least once during the year."

Upon the 24th day of October, 1885, James H. Barry, being then a single man, residing in Madison, made written application for membership in the Madison branch of the defendant corporation, in which application he stated as follows:

"Having read the constitution and laws of your order, the subordinate constitution and by-laws, and being fully acquainted with the objects of your order and fully endorsing them, I desire to become a member of your branch, and of your order, and if elected eligible to membership and admitted upon examination, I do promise to faithfully carry out the principles as set forth in the constitution of your order, your subordinate constitution and by-laws; and upon any failure on my part to strictly conform to the said constitution and subordinate constitution and by-laws, that now, or may hereafter govern your order, as well as your branch, I do hereby agree to forfeit all rights to membership and benefits."

Upon this application a benefit certificate was issued to him December 3, 1885, in which his father and sisters were named as beneficiaries. September 23, 1890, Barry was married to the plaintiff at Batavia, Illinois, by a Protestant minister; the plaintiff having been previously married to one Moulton, whom she left in 1884, there being no evidence as to his death or whether a divorce had been obtained. On December 19, 1891, Barry surrendered the first certificate issued, and a new certificate was issued to him, in which the plaintiff was named as the sole beneficiary; the defendant's officers not knowing at the time the fact that Barry had been married by a Protestant minister. This certificate recites that it is issued in consideration of the statements and representations made in the original application, which is made a part of the certificate, and upon the express condition that

Barry should well and truly perform all of the requirements of the constitution, laws, and regulations of the order then in force or thereafter adopted; and provided that, if he did do so, and in that case only, the order would pay to the beneficiaries the death benefit.

From 1893 up to his death Barry lived outside of the state. June 4, 1893, the Madison branch voted to expel him from the order because of his marriage by a Protestant minister, by which fact he ceased to be a practical Catholic. This action was claimed by the appellant to be void for lack of proper notice and other reasons. Barry died October 11, 1898. Proofs of his death in the ordinary form of life insurance proofs were tendered to the defendant's officers in due time, and refused. Said proofs contained no statements showing that Barry had performed his church duties as required by the constitution and articles of incorporation, nor that he was at the time of his death a practical Catholic. There was undisputed proof that by the laws of the Roman Catholic Church a member thereof who is married by a Protestant minister is thereby excommunicated, and the trial court found that Barry at the time of his death had ceased to be a practical Catholic, and for that reason the plaintiff was not entitled to recover, and the complaint was dismissed, and the plaintiff appeals.

For the appellant the cause was submitted on the brief of *Pliny B. Smith* and *R. B. Mallory.*

For the respondent there was a brief by *Wigman, Martin & Martin,* and oral argument by *P. H. Martin.*

WINSLOW, J. There were a number of interesting questions discussed in the briefs in this case, which we have not found it necessary to consider. To our minds, a few simple propositions demonstrate the correctness of the judgment. The defendant corporation was organized for the sole benefit of members of the Roman Catholic Church, and for them

only so long as they remain practical Catholics. The decedent, in his application for membership, understood this, and agreed that, if admitted, he would faithfully carry out the principles set forth in the constitution and by-laws of the order, and that upon any failure so to do he should forfeit all right to membership and benefits. This agreement became part of the contract of insurance by the terms of the certificate in suit, and the certificate further provided that the death benefit should only be payable in case the insured should well and truly perform all the requirements on his part prescribed by the constitution, by-laws, and regulations of the order during his lifetime. Thus the liability was doubly guarded: first, by an agreement to forfeit the benefit in case of noncompliance with the laws of the order; and, second, by a clause making liability dependent upon compliance. These contract provisions are self-executing. The laws of the order provide, in terms too plain to be misunderstood, that none but practical Catholics shall be admitted to the order, and that members must remain practical Catholics and communicants of the church in order to participate in the benefits. The evidence shows that the decedent was *ipso facto* excommunicated and ceased to be a Catholic, practical or otherwise, upon being married by a Protestant minister. Thus, by virtue of the provisions of the contract sued on, all liability ceased, and expulsion was not necessary.

An argument is made that these provisions are contrary to the policy of the law, in that they impose a religious test, and secs. 18, 19, art. I of the constitution are cited. The objection seems puerile. By these provisions no man's conscience is coerced, nor his freedom of worship curtailed. Membership is purely voluntary. If a man chooses to join an organization having such requirements, and agrees that he shall forfeit his right to benefits on failure to live up to them, he is at liberty to do so. All men may make contracts as they choose, so long as they be not contrary to law or public policy.

The point has been expressly decided in other courts in accordance with these views. *Franta v. Bohemian R. C. C. U.* 164 Mo. 304, 63 S. W. 1100, 54 L. R. A. 723; *Mazurkiewicz v. St. Adelbertus A. Soc.* 127 Mich. 145, 86 N. W. 543, 54 L. R. A. 727.

By the Court.—Judgment affirmed.

WOOD, Appellant, vs. CHAMBER OF COMMERCE OF THE CITY OF MILWAUKEE, Respondent.

October 1—October 20, 1903.

Corporations: Chamber of commerce: Disciplining members: Trial for offenses: Sufficiency of charges: By-laws construed: Accusers as judges: Equity: Injunction.

1. Where the by-laws of a corporation give the board of directors power to try any member of the corporation upon charges made in a prescribed manner, and to censure, suspend, or expel him if he be found guilty, a court of equity will not interfere to prevent the exercise of such jurisdiction, upon the mere assumption that the board, if permitted to exercise it, will commit jurisdictional error or will deny to the accused a fair trial. *Bartlett v. L. Bartlett & Son Co.* 116 Wis. 450, distinguished.
2. The sufficiency of the charges in such a case is a matter to be determined in the first instance by the trial board.
3. Mere indefiniteness in the charges is not a ground for the interference of a court of equity, since the trial board itself has ample power to enforce the right of the accused to have them made specific, and will presumably do so.
4. By-laws of a chamber of commerce organized "to promote just and equitable principles in trade," giving its board of directors power to censure, suspend, or expel any member found guilty of certain offenses, described in language not limited as to place or as to the other persons concerned therein, are *held* to cover and apply to conduct of the nature specified on the part of members in their dealings with nonmembers and outside of the local jurisdiction of the corporation.

5. By-laws of a corporation making it the duty of the board of directors to examine all charges against any member of the corporation made in the prescribed manner by any other member or members, do not preclude members of the board from making such charges or from taking part in the trial of a member upon charges made by themselves.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

The appeal is from an order dissolving a temporary injunction. The action of the court was based upon the pleadings and supporting affidavits. The substance of the complaint is as follows: The defendant is a corporation duly organized under the laws of Wisconsin. It possesses power to make and enforce by-laws not inconsistent with its charter or the law of the land. Its governing board consists of nine directors. Such board possesses power to investigate complaints against members for violations of its rules and by-laws and to discipline such members, if found guilty, in the manner prescribed in such by-laws. The declared objects of the corporation are:

"To promote just and equitable principles in trade, to correct abuses, to establish and maintain uniformity in the commercial usages of the city, to acquire, preserve and disseminate valuable business information, and to support such regulations and measures as may advance the mercantile and manufacturing interests of the city of Milwaukee."

Among the by-laws of the corporation are the following:

Rule 4, sec. 10: "It shall be the duty of the board of directors to examine charges against any member of the association, when made in writing to the president or secretary, by any other member or members, and if the party accused shall be found guilty of improper conduct of a personal character in the rooms of the association; of a violation of the rules, by-laws or regulations of the association; of making or reporting any false or fictitious purchases or sales; of any act of bad faith; of any attempt at extortion; of any act contrary to the spirit which should govern all commercial transactions; or of any other dishonorable or dishonest conduct, he-

shall be censured, suspended, or expelled by the board of directors, as it may determine from the nature and gravity of the offense committed. It shall be deemed an offense against the rules of the *Chamber of Commerce* for any person to act as a broker or commission merchant, or to buy or sell any grain or other property for an agent or employee of any telegraph company doing business in the city of Milwaukee, and upon complaint, in writing, of a member of the *Chamber of Commerce* or any officer or agent of any telegraph company, charging such offense against any member of this association, the board of directors shall investigate such complaint; and if the member accused shall be found guilty, he shall be censured, suspended, or expelled, as the directors may determine, in the manner prescribed in this section."

Rule 4, sec. 13: "All charges, excepting as to violations under sec. 9 of rule XI, made to the board of directors against any member of the association for any default, misconduct or offense, shall be in writing, and shall state the default, misconduct or offense charged, and the same shall be signed by one or more members of the association or by a business firm, one or more of whose members shall be members of the association."

Rule 4, sec. 14: "No member shall be censured, suspended, or expelled under this rule without an examination of the charges against him by the board of directors, nor without having an opportunity of being heard in his own defense. No examination shall take place until the member accused shall have had six days' prior notice of examination served on him, or fifteen days' prior notice mailed to him in case he has no place of business or residence in the city of Milwaukee. All such notices must be accompanied by a copy of the charges against him, in writing. Such notice may be served upon the accused personally by the secretary, or any assistant, or it may be left at the ordinary place of business or residence of the accused; or it may be mailed as above, in either of which cases the notice shall be considered sufficient, and the examination may proceed, whether the accused be present or not."

Rule 4, sec. 27: "Any member of the *Chamber of Commerce* who shall be interested or associated in business with, or who shall act as the representative of, or who shall knowingly ex-

ecute any order or orders for the account of any organization, firm, or individual engaged in the business of dealing in differences on the fluctuations in the market price of any commodity without a *bona fide* purchase and sale of property, with intent for an actual delivery, shall be deemed guilty of unmercantile conduct, which renders him unworthy to be a member of the association; and upon complaint to and conviction thereof by the board of directors, he shall be expelled from membership in the association."

Rule 12, sec. 1: "The president of the *Chamber of Commerce* shall at the first meeting of the board of directors after the annual election in each year, or as soon thereafter as practicable, appoint a committee of five to serve for one year, or until their successors shall have been appointed and qualified, to be known as the Committee on Membership, whose duty it shall be to examine all applications for membership; and any male person of legal age wishing to become a member of this association shall present an application in writing, signed by a member, either through the secretary or the chairman of the committee on membership, and a majority of said committee being satisfied that said applicant should be admitted as a member, the name of said applicant shall be placed on the bulletin board of the exchange room, at least ten days prior to any meeting of the board of directors. During the time that the name of such applicant is thus posted, any member in good standing may file with the secretary in writing, signed by such member, objection to the admission of such applicant as a member, and if seven or more members object to the election of such applicant, he shall be ineligible for election; but if no member, or less than seven members object to his election, the secretary shall report the name of such applicant to the board of directors. The board of directors shall vote by ballot upon the election of every applicant thus proposed for membership, and if there be seven ballots in his favor and not more than two ballots appear against him, he shall be declared elected, and upon signing an agreement to be governed by the charter, rules, and by-laws of the *Chamber of Commerce,* and paying an initiation fee of five thousand dollars, together with the annual or other assessment then due, or on presentation of a certificate of unimpaired or unforfeited membership,

duly transferred, and paying the transfer fee of five dollars, he shall become a member of the *Chamber of Commerce.*

"Members hereafter (after May 4, 1899) admitted will not be entitled to participate in the Gratuity Fund unless qualified under the requirements prescribed in the rules relating thereto."

Rule 12, sec. 2: "Before any membership can be transferred under the provisions of this rule, notice of, or application for, such transfer shall have been posted upon the bulletin of the exchange room for at least ten days; when, if no objection shall have been made on account of any unsettled contracts, claims, demands, or complaints against the holder of such membership, it shall thereupon be assumed that the membership is unimpaired; and after transfer of membership no subsequent complaint, claim, or demand against the former holder shall impair such membership so transferred and in the hands of an innocent party. But such transfer of membership shall not entitle the member to whom the same shall be transferred to participate in the Gratuity Fund, unless qualified under the requirements of the rules relating to said fund. The notice or application for transfer shall state the name of the person to whom it is proposed to be made. Objections to the transfer must be in writing, signed by the party objecting, and filed with the secretary, and the party objecting shall also, on the day of filing the same, serve a copy of his objections upon the applicant for transfer. The board of directors shall, upon hearing the parties, determine the sufficiency of such objections. In case any membership shall be transferred in violation of any of the foregoing provisions, such transfer shall be null and void."

Rule 12, sec. 7: "Every member shall be entitled to receive a certificate of membership, bearing the signature of the president and secretary, and the seal of the corporation, which certificate, if the membership it represents be not impaired or forfeited under the rules and by-laws of the association, and if the member holding it have no unadjusted or unsettled claims or contracts outstanding against him, held by members of the *Chamber of Commerce,* shall be transferable upon the books of the association to any person duly elected a member, upon the payment of five dollars, and any unpaid

assessment due thereon. The certificate of membership of a deceased member shall be transferable in like manner by his legal representative."

For many years certificates of membership in the corporation have been freely bought and sold and transferred by assignment, and the formalities indicated in the quoted rules have not been regarded as material, nor has any attempt been made to enforce the same except in the event of the holder of an assigned certificate applying to be elected a member of the corporation. The uniform custom has been to regard the transfer of a member's certificate as terminating his connection with the corporation. In May, 1902, plaintiff purchased in the regular course of business and took an assignment of a membership in the association, paying $970 therefor. Such proceedings were thereafter duly had that he was elected a member of the association and a certificate, in due form, was issued to him in place of his assigned certificate. Since that time plaintiff has paid all his dues to the corporation and obeyed all its by-laws. He is a member of the firm of Edwards, Wood & Co., a firm composed of Robert H. Edwards, Forest B. Wood, and himself. The firm has always been engaged exclusively in the business of commission brokers, dealing for their customers in stocks, bonds, grain, produce, and provisions for future delivery, and in cash grain, and plaintiff has been exclusively engaged in transacting its business. August 16, 1902, plaintiff sold and assigned his certificate of membership in the usual way, to E. L. Brown, then a member of the association, and a member of the firm of I. G. Andrews & Co. August 20, 1902, Brown deposited said certificate with the defendant, together with the required fee for the issuance of a new certificate, and requested such transfer as provided in sec. 7, rule 12, and at the same time requested defendant to take the necessary steps to that end, required by sec. 2 of rule 12. The association has unjustly refused to honor such request. I. G. Andrews,

at the time plaintiff assigned his certificate as aforesaid, was and still is a member of the association. At such time there was not, nor is there now, any unsettled claims of any kind against plaintiff or Edwards, Wood & Co., or any member thereof, in favor of defendant or any member thereof, nor has any complaint been lodged against plaintiff under sec. 2 of rule 12 aforesaid, or otherwise. September 4, 1902, E. J. Furlong, Harry Berger, and Walter Stern, assuming to act as members of a committee on market reports, filed with the board of directors of the association a paper falsely charging plaintiff, or the firm of Edwards, Wood & Co., with making or reporting false or fictitious purchases or sales in violation of sec. 10, rule 4, and of having been guilty, on or about July 9, 1902, of dealing in differences on the fluctuations in the market price of a commodity without a *bona fide* purchase or sale for actual delivery, in violation of said sec. 27 of rule 4. September 6, 1902, plaintiff received a copy of such paper, with a notice that a hearing on such charges would be had by the board of directors of the association September 25, 1902, at 3 o'clock p. m. Such paper contained the following:

"*To the Board of Directors of the Chamber of Commerce of the City of Milwaukee—*

"*Gentlemen:* The undersigned hereby complains of *Lewin A. Wood,* a member of the *Chamber of Commerce of the City of Milwaukee,* and makes the following charges against him:

"First: That the said *Lewin A. Wood,* or the firm of Edwards, Wood & Co., of which he is a member, was on, about, or prior to July 9, 1902, guilty of making or reporting false or fictitious purchases or sales in violation of sec. 10 of Rule IV of the rules of the *Chamber of Commerce of the City of Milwaukee.*

"Second: That the said *Lewin A. Wood,* or the firm of Edwards, Wood & Co., of which he is a member, was on, about, or prior to July 9, 1902, guilty of dealing in differences on the fluctuations in the market price of a commodity without a *bona fide* purchase or sale for an actual delivery, in violation of sec. 27 of Rule IV."

Since the plaintiff assigned his certificate of membership he has, according to custom, regarded his connection with the association as terminated. He challenges the jurisdiction of the board to try him on charges for violating the by-laws of the corporation after assigning his certificate of membership and parting with the ownership thereof. The board of directors of the association are prejudiced against plaintiff, have prejudged the matters upon which they propose to sit as judges, and are incapable of giving plaintiff an impartial trial in respect thereto. Plaintiff and his firm are extensive dealers throughout a large territory. Their reputations as business men are a valuable asset. The threatened trial, if allowed to take place, regardless of the result thereof, will injure the good name of plaintiff and his firm irreparably. When plaintiff assigned his certificate he intended to wholly retire from the association, as its officers well knew. The committee, styling itself a "Committee on Market Reports," that filed the charges, is not recognized by, and is wholly unknown to, the corporation charter and its rules and by-laws. All of the acts of the officers of the association and its committee on market reports embarrassing the efforts of plaintiff and his assignee to have the certificate of membership transferred upon the books of the corporation to such assignee, are parts of a scheme to forfeit plaintiff's certificate of membership to the corporation. The directors of defendant, unless restrained by the court, will, on September 25, 1902, at 3 o'clock p. m., in form try and condemn and sentence plaintiff, and forfeit his certificate, thereby causing him irreparable damage.

The decision prayed for is to this effect: First, that the sale and assignment of plaintiff's certificate to E. L. Brown terminated plaintiff's membership in the association; second, that such membership is unimpaired and that plaintiff is entitled to have the same transferred to E. L. Brown or to such other member of said defendant as said Brown or the firm of

I. G. Andrews & Co. may direct; third, that defendant and its officers and board of directors have no jurisdiction to try plaintiff upon the charges filed; fourth, that plaintiff is entitled to have defendant and its officers, and each and all of them, enjoined from attempting to exercise any jurisdiction over plaintiff in respect to the charges filed against him, and to a temporary injunction in respect to such matters pending the litigation.

The answer, so far as concerns the question here raised,—in addition to numerous admissions covering the allegations of the complaint as to the membership of plaintiff in the defendant corporation, the by-laws of the corporation, the assignment by plaintiff of his certificate, the conduct of the association in respect thereto, the filing of charges against plaintiff, and his impending trial thereon, and denials on information and belief,—was this in substance: The by-laws of the corporation, in addition to those mentioned in the complaint, that are material to this litigation, include these:

Rule 4, sec. 1: "All the financial and business concerns of the association shall be managed and conducted (in accordance with the charter and rules of the association) by and under the direction of the board of directors; and no moneys shall be paid except on its vote on each sum proposed to be paid. It shall be the duty of the board of directors to inquire into matters affecting the welfare of the association, or the business interests of the city of Milwaukee, and to report upon the same to the association, together with such recommendations as to rules and regulations, rates of commission and charges, as may be deemed advisable. The board of directors shall, annually, on the second Monday in April of each year, or as soon thereafter as may be practicable, appoint three standing committees, of five members each, to act respectively as supervisors of flour inspection, of grain inspection and weighing, and of inspection of provisions and cooperage, and such other committees, inspectors, gaugers, weighers, measurers, and other officers or servants, not otherwise provided for, as in its opinion may be for the best interests of the association."

Rule 4, sec. 11: "It shall be the duty of the board of directors, in case any grave offense, committed by any member of the association against the good name or dignity thereof, shall come to its knowledge, either by public rumor or report, to cause a preliminary or informal investigation to be made by a committee of its members into the truth or falsity of such rumor or report. If such committee, after investigation, shall deem such rumor or report sufficiently well founded, it shall so report to the board of directors, with charges, whereupon the person thus implicated shall be notified in the manner provided in section fourteen (14) of this rule, to appear before the board of directors, and, if found guilty, he shall be censured, suspended, or expelled. A majority of a quorum sitting at a regular, special, or adjourned meeting of the board of directors, shall be sufficient to censure, but to suspend or expel a member of the association for any offense enumerated in this or the foregoing section, it shall require an affirmative vote of two thirds of the members present, in which case it shall require at least six affirmative votes to suspend or expel."

The corporation customarily had a standing committee, appointed each year, known as the "Committee of the Board of Directors on Market Reports." For the year commencing the second Monday of April, 1902, the persons who signed the charges filed against plaintiff were members of such committee. In their capacity as members of the corporation and of such committee they filed the charges against plaintiff mentioned in the complaint, in the regular way. The alleged proceedings taken by the corporation and its officers in respect thereto were regular in all respects, being in conformity with the by-laws of the corporation, and for the purpose of giving plaintiff a fair and impartial hearing. About August 26, 1902, a notice was duly posted that application had been made for transfer of plaintiff's membership in the association to Warren E. Stacks. Within the time allowed by the rules of the association therefor objection was duly made to such transfer, pending the investigation of the charges against plaintiff theretofore filed. Upon such objection being made

the application was withdrawn and no application was thereafter made for a transfer of such membership. The effect of the pending charges against plaintiff and the objection to the transfer of his membership was to impair such membership and render it nontransferable.

Allegations of the answer on material points were corroborated by affidavits. Some supporting affidavits were also presented on behalf of plaintiff.

Upon the verified complaint a temporary injunctional order was obtained. Upon the pleadings and supporting affidavits such order was set aside, and plaintiff appealed.

For the appellant there was a brief by *James W. Bass,* attorney, and *Durment & Moore,* of counsel, and oral argument by *E. S. Durment.* They contended, *inter alia,* that the alleged conduct upon which the charges are based was not in the rooms of the exchange, nor in any way connected with the defendant, and plaintiff is not amenable to the defendant therefor. The rules and by-laws do not purport to apply to such conduct, and if they do they are void. *Flint v. Pierce,* 99 Mass. 68; *Ireland v. Globe M. Co.* 21 R. I. 9; 3 Clark & M., Priv. Corp. § 638*b*, p. 1941; *State ex rel. Graham v. Chamber of Commerce,* 20 Wis. 63; *Comm. v. St. Patrick Ben. Soc.* 2 Binn. 441; *People ex rel. Gray v. Medical Soc.* 24 Barb. 570; *Cartan v. Father Mathew U. B. Soc.* 3 Daly, 20; *Kolff v. St. Paul F. Exch.* 48 Minn. 215. It is in contravention of the law of the land that the prosecutor shall also act as judge. *Murdock v. Phillips Academy,* 12 Pick. 263–265; *People ex rel. Meads v. Alpha Lodge,* 13 Misc. (N. Y.) 687.

For the respondent there was a brief by *Miller, Noyes & Miller,* and oral argument by *G. H. Noyes.* They argued, among other things, that the complaint states no cause of action in equity. To make out a case for an injunction it must appear that there is at least a reasonable probability, not merely a bare possibility, that a real injury will occur if the

writ is not granted. *Sage v. Fifield,* 68 Wis. 546; *Home Ins. Co. v. Nobles,* 63 Fed. 642; *Truly v. Wanzer,* 5 How. 141; *Lorenz v. Waldron,* 96 Cal. 243; 16 Am. & Eng. Ency. of Law (2d ed.) 361. One court cannot entertain jurisdiction of an action upon the ground that another court of competent jurisdiction will decide wrongly or improperly. *Wolfe v. Burke,* 56 N. Y. 115; *West v. Mayor,* 10 Paige, 539. Acting within its jurisdiction, the board of directors has over its members the judicial authority of a court. *Dickenson v. Chamber of Commerce,* 29 Wis. 45; *State ex rel. Cuppel v. Milwaukee Chamber of Commerce,* 47 Wis. 670; *Belton v. Hatch,* 109 N. Y. 593; *Bartlett v. L. Bartlett & Son Co.* 116 Wis. 450, 93 N. W. 473. The same presumption of fairness and impartiality must therefore be indulged in its favor as in favor of a court. No case is cited and we have found none where a court has asserted its equitable powers to enjoin an impartial hearing before another tribunal under the rules of such an association. It is settled doctrine that a suit in equity for such purpose is not maintainable. *Thomas v. Musical M. P. Union,* 121 N. Y. 45–57; *Hurst v. N. Y. Prod. Exch.* 100 N. Y. 605, 1 Cent. Rep. 260; *Gregg v. Mass. Med. Soc.* 111 Mass. 194. The board had jurisdiction, although the transactions complained of do not appear to be with members and in the chamber. *Dickenson v. Chamber of Commerce,* 29 Wis. 45; *People ex rel. Thacher v. N. Y. Comm. Asso.* 18 Abb. Pr. 271–279; *Haebler v. N. Y. Prod. Exch.* 149 N. Y. 414, 44 N. E. 87. Members of the association, although members also of the board of directors, may make charges. *Green v. Board of Trade,* 174 Ill. 585, 51 N. E. 599.

Marshall, J. This appeal must turn on whether the complaint states a cause of action. That depends on whether the board of directors of the defendant had jurisdiction under the laws of the corporation to consider the charges filed against appellant. At the outset such jurisdiction was chal-

lenged because plaintiff assigned his certificate. It is now conceded that such circumstance did not sever appellant's connection with the corporation nor militate against the power of its board to try him upon charges filed. The material grounds now insisted upon to support the claim of want of jurisdiction will be considered in detail.

1. Do the facts alleged against appellant constitute an offense against the laws of the corporation? It is a sufficient answer to that to say that a court of equity never exercises its jurisdiction to prevent another court or tribunal from exercising its jurisdiction upon the theory that if permitted to do so it will commit jurisdictional error. That is what the action before us seems to have been aimed at. At the outset of the trial of appellant before the board it must necessarily accord to him a hearing on the question of the sufficiency of the charges filed. By his membership in the corporation he is bound by contract, so to speak, to submit that question to the proper corporate tribunal, the same as he is the question of his guilt or innocence. The situation of appellant is unlike that of the plaintiff in *Bartlett v. L. Bartlett & Son Co.* 116 Wis. 450, 93 N. W. 473. There the tribunal of the corporation exercised its jurisdiction to decide upon the matter in hand, but exceeded it by reason of violating the rules of the corporation. If the action had been brought to prevent the trial board from making a decision, upon the ground that if suffered to do so it would go beyond its jurisdiction, manifestly the action could not have been maintained.

2. Are the charges sufficiently specific to comply with the rules of the corporation? That is effectually met by the familiar rule that mere indefiniteness is not a jurisdictional defect. If appellant deems the charges indefinite his remedy is an appeal to the trial board to have them made specific. The board has ample jurisdiction to hear all complaints of that kind, and a court of equity cannot, in advance of its acting at all, assume that when called upon to do so it will either

refuse to perform its duty or commit jurisdictional error otherwise. No doubt, as said in *Hutchinson v. Lawrence*, 67 How. Pr. 38, to which our attention has been called, in every proceeding to discipline a member of a corporation for violating its laws he is entitled to be informed of the charges with sufficient definiteness to enable him to know the precise nature thereof; but the primary tribunal to enforce that right is the one provided by the corporation. Hence, a suit to enjoin it from acting while it has jurisdiction over the subject matter must be regarded as one to interfere with the exercise of jurisdiction rather than one to avoid the injurious results of jurisdictional error.

3. The point is further made that the conduct called in question did not concern the corporation or any of its members, hence it is not covered by the by-laws; that the corporation has no jurisdiction to try appellant for what he may have done outside of its jurisdiction or with a stranger. The language of the by-laws is general. In its literal sense it covers conduct on the part of members of the corporation regardless of place or of the person concerned therein. That is in strict harmony with the declared purpose of the corporation, to promote just and equitable principles in trade—not merely between the members of the corporation or in its chamber, but generally. Consistent with that, the by-laws were made to require the members of the corporation to observe a proper standard of conduct generally. In no other way could the corporation efficiently "promote just and equitable principles in trade." To allow a person to enjoy its benefits as a member so long as his conduct with its members shall be above reproach, regardless of his conduct with strangers, would tend to promote a low rather than a high standard of business morals. Rules of the character of those under consideration have been commonly held to cover conduct of members of the corporate body outside its local jurisdiction. *People ex rel. Thacher v. New York Comm. Asso.* 18 Abb. Pr. 271, cited

by respondent's counsel, is directly in point, and covers the entire field of controversy on this part of appellant's argument. The object of the corporation there, as here, was to "inculcate just and equitable principles of trade." A member was expelled for violating a by-law which was framed in general language. A writ of *mandamus* was sued out to obtain a reinstatement of the member, the claim being made that the by-law did not cover his case, as the offense charged, if committed, occurred outside the local jurisdiction of the corporation and with a stranger; that to construe the by-law as reaching such a case would call for its condemnation for unreasonableness. The court held that the purpose of the corporation and its by-laws clearly concerned the conduct of its members with strangers as well as with each other; that to hold that the corporation could promote a high standard of business morals by controlling the conduct of its members with themselves and leaving them free to violate its standard of trade ethics in their dealings with strangers would be absurd. The language of the opinion received the approval of the court of appeals in *Haebler v. New York P. Exch.* 149 N. Y. 414, 44 N. E. 87, and so fully meets the argument of appellant's counsel here at this point, that we may well give it a place in this opinion:

"If it [the by-law] was obligatory upon him it was binding at all times. He had no right to make a distinction between dealing with members and strangers. He had no right to say: I will inculcate these doctrines while at the association, but I claim the privilege outside of it to be as dishonest as I choose. I will be straightforward and honest in my dealings with one class of persons; but with others I will violate the principles of integrity to which I have subscribed. If such a course of conduct could be tolerated and allowed, then so far as this great object is concerned, the association would be of no account, of no sort of importance. It would only be a shield to cover up dishonesty and fraud outside of its meetings and when its members were engaged in dealing with strangers. Its professions of morality could amount to nothing,

and be but an empty name without any substance. In fact, while its ostensible object would be elevated and honorable, it would be but a cloak for those who sought to avail themselves of its privileges to be guilty of evil practices and improper behavior."

4. The further point is made that the board of triers have no jurisdiction to entertain the charges because they were preferred by a member of the board. As suggested by respondent's counsel, that is answered effectually by the fact that the by-laws require the board to examine all charges against any member, reduced to writing and filed by any other member or members with the president or secretary. There is no exception. The members of the board of directors are not precluded by any by-law from filing charges against a brother member, or exempted for any cause from performing their duty as directors to examine into filed charges. That condition of things appellant assented to in joining the corporation, the same as he assented to any other feature of the jurisdiction of the board as laid down in its by-laws. Moreover, as an independent proposition, a board exercising mere quasi-judicial powers is not necessarily ousted of its jurisdiction in respect to any particular subject within that jurisdiction because the proceedings before it in that particular matter were instituted by one of its members. This court decided that in *State ex rel. Starkweather v. Superior,* 90 Wis. 612, 64 N. W. 304. There one of the members of the common council filed charges against the mayor, and he and others interested in the result subsequently participated as members of the council in trying him upon such charges. The claim was made, upon common-law writ of *certiorari,* that the participation of such interested members of the council in the trial was fatal to the judgment rendered. This court held otherwise, because the charter made it the duty of the persons whose conduct was assailed to act as members of the trial body, and made no provision for their exemption upon

the ground of prejudice or other cause; that as the legislature created the office of mayor it had a right to provide any method it might see fit for the removal of an incumbent of the office for cause; that, under the charter, interest of one or more members of the trial body in the result did not go to the jurisdiction of such body. The court did not intend, later, to overrule that in *State ex rel. Getchel v. Bradish,* 95 Wis. 205, 70 N. W. 172.

We can see no good ground for holding that the complaint shows that the board of directors of respondent has committed jurisdictional error. The cause seems to be wholly grounded upon the idea that if the board is permitted to exercise its jurisdiction appellant will not have a fair hearing. If that were sufficient to warrant a court of equity in controlling the duly constituted tribunals of corporations and preventing them from exercising their jurisdiction, an easy way would exist for removing the trial of offenses against the by-laws of corporations from the jurisdiction of their tribunals to the courts. No such judicial authority exists. The methods provided by the laws of a corporation for disciplining its members, unless void for unreasonableness or violative of some law of the corporation itself, or of the land, are supreme. If the corporation violates its laws in the trial of one of its members, thereby committing jurisdictional error to the injury of the property rights of a member, equity will furnish him a remedy if he has none other.

By the Court.—The order is affirmed.

BURBACH, by guardian *ad litem,* Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

October 1—October 20, 1903.

Guardians ad litem: *Liability for costs: Enforcement: Constitutional law: Imprisonment for debt: Equal protection of laws: Form of judgment.*

1. Sec. 2931, Stats. 1898, providing that "when costs are adjudged against an infant plaintiff" his guardian *ad litem* "shall be responsible therefor, and payment may be enforced by attachment," might be sustained as to the guardian's liability, even if the provision as to enforcing payment were unconstitutional.
2. The "attachment" referred to in said sec. 2931 is not a *capias ad satisfaciendum,* but merely the ordinary process by which one is brought before the court to answer for an alleged contempt, and the section does not, therefore, authorize imprisonment for debt in violation of sec. 16, art. I, Const.
3. Guardians *ad litem* are so distinguished from executors, trustees, or other persons prosecuting actions in a fiduciary capacity, that the legislature may properly classify them separately in respect to their liability for costs, and in so doing does not deny to them the equal protection of the laws.
4. When costs are adjudged against an infant plaintiff, the liability of the guardian *ad litem* therefor results from the express provisions of sec. 2931, Stats. 1898, and need not be declared in the judgment, which should be in the ordinary form.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Modified and affirmed.*

Action for personal injuries, in which the jury found plaintiff guilty of contributory negligence. Upon such verdict, on motion for defendant, order for judgment was made directing judgment for costs against the plaintiff, *Peter Burbach,* and ordering "that said judgment may be collected of said guardian *ad litem,* Charles Mueller, and execution thereon may issue against the said Charles Mueller." Thereafter, and before judgment, upon plaintiff's motion, the court modified such order "by vacating, setting aside, and striking out that provision of the said order which directs that the

judgment in the above-entitled action may be collected of Charles Mueller, the above-named guardian *ad litem,* and inserting in lieu thereof the direction that said judgment shall be collected from the estate of the above-named infant, *Peter Burbach,* solely," to which order the defendant duly excepted. Thereupon judgment was rendered dismissing the action, adjudging recovery by the defendant of $37.40 costs, and ordering and adjudging "that this judgment shall be collected solely from the estate of said infant, *Peter Burbach.*" From that judgment, and the whole and every part thereof, defendant appeals.

For the appellant the cause was submitted on the brief of *Spooner & Rosecrantz.*

For the respondent there was a brief by *Cummings, Hayes & Thiel,* and oral argument by *W. F. Thiel.*

DODGE, J. Since 1849, at least, it has been the declared legislative policy of the state that one who, as next friend or guardian *ad litem,* lends himself to the bringing of a suit by an infant plaintiff, shall be responsible for any costs adjudged against such plaintiff. Sec. 29, ch. 90, R. S. 1849, was adopted directly from New York, where it had been enacted in 1829, and declared this policy. In 1856, in the adoption of the Code also from New York, was enacted sec. 226, ch. 120, Laws of 1856, identical in words with our present sec. 2931, Stats. 1898, preserving the declaration that such guardian shall be responsible for costs adjudged against the plaintiff, and merely adding, "and payment may be enforced by attachment." This policy, standing thus unassailed for half a century, has, by the judgment of the superior court, been set at naught.

Of the grounds of this decision we are not fully informed. The most strenuous contention of respondent's counsel is, however, that sec. 2931 is unconstitutional, because the provision for enforcement of payment of costs by attachment is

in disobedience of sec. 16, art. I, Const., prohibiting imprisonment for a debt arising out of or founded on contract, expressed or implied. Even if this position were conceded, the conclusion of the court below would seem a pretty complete *non sequitur*. The substantial enactment of the legislature is that the guardian *ad litem* shall be responsible for costs, and no reason is apparent why this may not stand, although the legislature may have authorized an unconstitutional method of enforcing that responsibility. It is a fundamental canon of statutory and constitutional discussion that a statute will be sustained as far as possible, eliminating any unconstitutional provisions thereof, unless it clearly appears that the latter were so integral to the whole purpose of the legislation that one part cannot stand without the other. *McGillivray v. Joint School Dist.* 112 Wis. 354, 359, 88 N. W. 310. That surely cannot appear here, for during the period at least from 1849 to 1856 the provision for the liability of the next friend did stand, with no specific direction as to how it was to be enforced, except as contained in other general provisions regulating the power and proceedings of courts. On the contrary, it must be apparent on a moment's consideration that such severance of the statute of 1856 is entirely possible, so that the court can and ought to sustain the statutory behest that the guardian *ad litem* be liable, even though it could not sustain the further provision that such liability be enforced by attachment.

But is the legislature restrained from this latter provision by the constitutional prohibition against imprisonment for debt? In discussing this same constitutional prohibition (*In re Meggett,* 105 Wis. 291, 297, 81 N. W. 419, 422), we said:

"It does not follow, necessarily, because a party owes a debt, and is imprisoned until he pays the same sum of money, that he is imprisoned for a debt; not more than it followed because Debs was imprisoned for doing an act which was a crime that he was being imprisoned for a crime without trial by jury (*In re Debs,* 158 U. S. 564, 15 Sup. Ct. 900; *Eilen-*

becker v. Dist. Ct. of Plymouth Co. 134 U. S. 31, 10 Sup. Ct. 424); nor more than it follows because one is imprisoned upon an execution against the body under a judgment for conversion or embezzlement that he is imprisoned for debt, although he may be indebted on implied contract for the property converted or the money embezzled."

It is under that principle that this and other courts have always recognized that the constitutional prohibition against imprisonment for contract debt did not take away the comprehensive and inherent powers of the courts to protect themselves and parties before them against wilful disobedience of their orders, upon the theory that such disobedience constituted a contempt of the court's authority. *In re Meggett, supra.*

But, indeed, it is not contended that, if an attachment against a recalcitrant guardian *ad litem,* who fails to pay the costs for which the statute makes him liable, is a mere exercise of the contempt power of the court, it is forbidden by our constitution. The respondent rests upon the contention that the statute attempts to confer an absolute power of imprisonment by process substantially identical with the common-law writ of *capias ad satisfaciendum,* and founds this view upon *Grantman v. Thrall,* 31 How. Pr. 464, and *Granholm v. Sweigle,* 3 N. D. 476, 57 N. W. 509, which seem to offer some support for it. Thus, in *Grantman v. Thrall* it was said by the general term of the supreme court of New York, in 1866, apparently without much consideration, that the words "payment thereof may be enforced by attachment" mean "a process in the nature of *ca. sa.* admits of no doubt," from which it was argued that the attachment mentioned in the statute was not a preliminary process to bring a party before court to show cause why he should not be punished by imprisonment as for contempt, but that the court was required to issue its absolute writ *ca. sa.* for his imprisonment until payment of the sum for which he was so liable. Upon the authority of this case the supreme court of North Dakota, dealing with a

statute identical to both that in New York and our own, and with a writ commanding absolutely arrest and imprisonment till the judgment was paid, held that the constitutional prohibition against imprisonment for debt was infringed. It seems clear to us that the premise upon which both of these courts proceeded was an erroneous one. The *Grantman Case* is quite distinctly overruled on this point in the same court by subsequent cases. *Morrison v. Lester,* 11 Hun, 618; *S. C.* 15 Hun, 538; *Schoen v. Schlessinger,* 57 How. Pr. 490; *Miller v. Woodhead,* 17 N. Y. Civ. Proc. 102, 5 N. Y. Supp. 88—in which it is held that the process of attachment authorized by the statute is the ordinary one long and well known as the mesne process by which one is brought before the court to answer for an alleged contempt, and upon which the court investigates and decides the fact of contempt and exercises its discretion as to the further steps to be taken by way of punishment or of coercing obedience to its former precept, and that it is error for a court to substitute in lieu thereof its absolute process *capias ad satisfaciendum,* commanding a sheriff to take and imprison a debtor until he makes satisfaction.

Independently of the direct authority in New York upon the question, we cannot seriously doubt that the word "attachment" is used in our statute in its correct signification, and that it authorizes what is described by Bouvier (1 Dict. Rawle's Revision, 187) as "a writ issued by a court of record, commanding the sheriff to bring before it a person who has been guilty of contempt of court, either in neglect or abuse of its process or of subordinate powers. 3 Blackstone, Comm. 280; 4 Id. 283." The word "attachment" was by no means novel in our statutes at the time of the enactment of the Code in 1856. Many illustrations of its use might be pointed out, but one specially germane to the subject now in hand is presented by the statutes of 1849 on the subject of contempt (subd. 8, sec. 1, ch. 115, R. S. 1849), authorizing punish-

ment by fine and imprisonment in "all other cases where attachments and proceedings as for contempts have been usually adopted and practiced in courts of record, to enforce the civil remedies of any party or to protect the rights of any such party." This is specially applicable, for under an exactly similar statute the courts of New York had been accustomed to enforce the liability of the next friend for costs by attachment prior to the adoption of the Code, which expressly authorized it for that purpose (*Wice v. Commercial F. Ins. Co.* 8 Daly, 70; *Miller v. Woodhead,* 17 N. Y. Civ. Proc. 102, 105, 5 N. Y. Supp. 88), and such was the recognized practice. 1 Tidd's Practice, 100; 2 Burrill's Practice (2d ed.) 81; *Slaughter v. Talbot,* Barnes, 128; *S. C.* Willes, 190. The same significance has also been given by this court to identical language in what is now sec. 2933, Stats. 1898, making an assignee liable for costs and subject to attachment to enforce payment, in *De Witt v. Perkins,* 25 Wis. 438, where the court, instead of attempting to issue its common-law writ for the imprisonment of an assignee until he satisfies the judgment, commanded him to appear and show cause why he should not be required to make payment; evidently considering the whole procedure as identical with that upon other charges of contempt. Contempt proceedings are especially appropriate to control of guardians *ad litem,* for they are officers of the court and subject to its commands. *Richardson v. Tyson,* 110 Wis. 572, 86 N. W. 250; subd. 1, sec. 3477, Stats. 1898. Again, they of course are not subject to execution, since they are not parties to the action and no judgment can properly be entered against them. Thus they fall within the class described in subd. 3, sec. 3477, subject to punishment as for contempt for nonpayment of money. The procedure is carefully regulated so as to ensure due notice and hearing before any order for imprisonment passes. Secs. 3480 *et seq.,* Stats. 1898.

From all these considerations, the conclusion is to our

minds irresistible that sec. 2931 authorizes nothing but the exercise of the inherent power of the courts against contempts, and in no wise infringes upon the immunity from imprisonment for debt guarantied by our constitution.

2. Another suggestion is made by respondent, that guardians *ad litem* are by this statute denied the equal protection of the laws, for that they are subjected to burdens not resting on other parties plaintiff nor on other fiduciaries, such as executors, administrators, or trustees. They are, however, so distinguished from all such others that we cannot doubt the power of the legislature to classify them separately. They are not parties to the suits they bring, nor subject to entry of judgment directly against them, and yet behind the shelter of the name of a minor, perhaps irresponsible, they have sufficient control to harass the defendant and absorb the attention of the court. If they do so without proper grounds, why should they not be liable at least for costs, like any other plaintiff? Again, they differ from all the other fiduciaries mentioned in that they need neither hold nor control any property of the beneficiary for whom they sue, while the very existence of an executor or trustee presupposes property in his hands out of which can be satisfied the costs of the suit he brings, if he acts for the welfare of his beneficiary. This distinction entirely justifies the provision of sec. 2932, Stats. 1898, that judgments for costs against such trustees shall be collected only out of the estate in their hands, but for bad faith, and the contrary provision that guardians *ad litem* shall be responsible personally to the defendant. Such guardian, if he acts in good faith and for the benefit of the minor, is, of course, entitled to be reimbursed such costs, in common with other necessary expenses, out of the estate of the minor, if he has any. *Tyson v. Richardson,* 103 Wis. 397, 79 N. W. 439.

We conclude, therefore, that no reason is suggested why sec. 2931, Stats. 1898, is not within the just powers of the

legislature, and that it should be given effect according to its terms. Clearly, the decision of the trial court, as embodied in the judgment appealed from, denied such effect to that statute, and was erroneous.

A further misconception, shared apparently by the court below and the counsel upon both sides, was that the judgment to be entered needed to expressly pass on the question of liability of the guardian *ad litem*. The true view on this subject, as fully illustrated by the New York decisions—albeit practice decisions, but which we deem founded on reason—is that the judgment for costs in the case of an infant plaintiff should be, in terms, against the plaintiff, as in any other case. Whether he may or may not have property within reach of ordinary execution is not significant. *Schoen v. Schlessinger,* 57 How. Pr. 490. The minor is the plaintiff, and, when he fails to recover, judgment for costs in favor of the defendant and against him is warranted by sec. 2920, Stats. 1898, in the same form as if he were not a minor. Sec. 2931, Stats. 1898, recognizes this by imposing liability upon the guardian "when costs *are adjudged* against an infant plaintiff." The liability of the guardian rests not upon the form of the judgment, but upon the express provision of the statute. It results that the judgment in this case should have followed the ordinary form that the defendant do have and recover from the plaintiff a specified sum of costs, and that the interpolation therein of the provision that they should be enforceable only against the estate of the minor was erroneous.

By the Court.—The judgment appealed from is modified by striking therefrom the paragraph: "And it is further ordered and adjudged that this judgment shall be collected solely from the estate of the said infant, *Peter Burbach,*" and, as so modified, is affirmed. Appellant to recover costs in this court.

GRAEBNER, Receiver, Respondent, vs. POST, Appellant.

October 1—October 20, 1903.

Corporations: By-laws: Adoption: Calls upon stock subscriptions: Notice: Waiver of irregularities: Setoff: Advances made: Receivers.

1. A set of by-laws for a corporation, approved at a stockholders' meeting before the articles of incorporation had been recorded, and thereafter, though never formally adopted in accordance with said articles by the board of directors, treated by such board as the by-laws during the existence of the corporation, will be deemed in law to have been the by-laws of the corporation.
2. One who, as a stockholder, director, and president of a corporation, participated in all the proceedings relating to the making and ratifying of calls on stock subscriptions and prescribing the notice to be given thereof, and who received notice of a call, gave his note for the amount due from him thereon, and afterwards presided at a meeting of the directors at which it was voted to apply upon the amount due from him on said calls moneys advanced by him for the corporation,—all without objection on his part that the call was irregular or illegal,—waived thereby any irregularity in said call or the notice thereof, and is estopped to question their validity.
3. Where the president of a corporation employed counsel to represent it in threatened litigation, before action had been taken to have the corporation declared insolvent and a receiver appointed, and advanced moneys to pay such counsel because no other funds were then available, and such acts were either authorized or ratified by the board of directors, which voted that credit be given him upon an unpaid call upon his stock subscription, the advances so made were a proper setoff in an action brought upon said call by a receiver subsequently appointed for the corporation.

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Reversed.*

Action by respondent, as receiver of the Blue Mound Investment Company, to recover balance due upon a stock subscription. The corporation was organized for "the buying and selling of real estate and improving the same and the

loaning of money upon securities." The articles of incorporation were recorded August 25, 1892. On the 22d day of August, 1892, at a stockholders' meeting, by-laws were presented and approved by them, but they were not thereafter formally adopted by the board of directors. These were the only by-laws the corporation had, and they were referred to and treated as the by-laws by the board of directors. Judgment had been rendered in a suit begun to foreclose a mortgage upon eighteen acres of land owned by the corporation. Pending an appeal to the supreme court from this judgment, a call for the unpaid balance on the assessable stock was made January 18, 1899. Reference was made in the call to the possibility of judgment being given for a large sum against the corporation in the foreclosure suit. The resolution is as follows:

"*Whereas,* litigation is pending against the Blue Mound Investment Company, which is to be determined on appeal to the supreme court, and as the same is uncertain as to how it will be decided and as a judgment is possible against this company for a large sum of money, aggregating between $8,000 and $9,000, and

"*Whereas,* it is thought best to be prepared for the worst, and to prepare in ample time, so as to prevent any danger of additional and unnecessary expense, be it

"RESOLVED, that a call be, and is hereby levied upon all unpaid subscriptions to the stock of the Blue Mound Investment Company for the entire amount remaining unpaid thereon, and that the same is hereby ordered to be paid into the company's treasury on or before the first day of August, 1899. Be it further

"RESOLVED, that the secretary notify every member of this company of this call by sending notice thereof, personally or by mail, as soon as he reasonably can do so."

Appellant participated in this meeting as president and stockholder, and also at subsequent meetings when this call was considered and ratified, without making any objection thereto. He gave his notes for the balance due on his sub-

scription. The time for payment under the call was extended at various times.

On February 24, 1900, the liabilities of the corporation, which were in the form of this judgment, amounted to the sum of $8,910.65. The assets consisted of cash, $1,396.85; unpaid stock subscriptions, $2,364.25; and the eighteen acres of land. The land was sold for $2,375, and a deficiency judgment entered for $6,105.55 on the 19th day of May, 1900. On the 21st day of May, 1900, upon the petition of the judgment debtor, the court, without giving notice of the application to the corporation, made an order declaring the corporation insolvent, and appointed a receiver. On the 19th day of May, 1900, the appellant, as president of the corporation, employed attorneys to protect the corporation in the litigation then threatened, and paid them $250 as a retainer. On the evening of the 21st day of May, 1900, at a meeting of the board of directors, this action of the president was ratified by resolution, and it was directed that he receive credit of $250 upon his unpaid stock, and that the secretary return to him his notes given for his unpaid assessment due on this call.

On appeal to the supreme court, the order appointing a receiver was set aside. 110 Wis. 470. Subsequently a new petition was filed and the corporation was given notice thereof. At a meeting of the directors on the 29th day of August, 1901, the president was authorized to advance and pay to the attorneys an additional sum of $100. These attorneys represented the corporation on such appeal, and resisted this application for the appointment of a receiver. The board of directors thereafter applied this amount as a payment upon the balance of his assessment. At the hearing of this petition the present receiver was appointed, and; on leave being granted, brought this action.

For the appellant there was a brief by *E. L. Wood* and *O. W. Bow,* and oral argument by *Mr. Bow.*

For the respondent there was a brief by *Austin, Fehr & Gehrz,* and oral argument by *W. H. Austin.*

SIEBECKER, J. Appellant contends the court erred in directing a verdict upon all the issues in respondent's favor, because no valid call was made for the unpaid stock subscriptions, and because his claim for a setoff was denied. It is asserted that no by-laws were ever adopted under the power expressly given to the board of directors by the articles of incorporation. A set of by-laws were prepared and approved at a stockholders' meeting, which was held before the articles of incorporation had been recorded. No other by-laws were thereafter prepared or formally adopted by the board of directors. It appears, however, that the set of by-laws so prepared were referred to and considered as the by-laws during the existence of the corporation. The evidence discloses that they were treated as the by-laws of the corporation at meetings of the board of directors, of which appellant was a member and its president from the time of the organization of the board. The conduct of the board of directors indicates that they regarded them as the by-laws of the corporation, and they should therefore be so regarded in law.

"By-laws may be adopted as well by the acts and conduct of the corporation as by express vote or adoption in writing, unless it is otherwise provided." *Germania I. M. Co. v. King,* 94 Wis. 439, 69 N. W. 181.

It is further objected that the call for payment of unpaid stock subscriptions has no validity, in that the proceedings taken for such call, under the by-laws, failed to provide the notice to stockholders as required by sec. 1754, Stats. 1898. This question becomes immaterial in the case, since we are persuaded that it abundantly appears appellant must be bound by the action of the corporation in making this call on stock subscriptions. He was a stockholder from the time of the organization of the corporation, and a member of the

board of directors and acted as its president from the time of its organization to the commencement of this action. He participated in making five calls for stock subscription without objection under a like resolution and notice to stockholders before this one of January 18, 1899. He took part in the proceedings of the board of directors in making this call by resolution and prescribing the notice to be given. He received printed notice thereof, accompanied by a copy of the resolution. He attended a meeting of the board of stockholders February 8, 1899, at which the call was ratified, and a like meeting at which payment under this call was extended to December 15, 1899. He made no objections at any of these times that the call was irregular or illegal, but assented to the proceedings taken in relation thereto. He made, executed, and delivered his promissory notes to the secretary, payable December 15, 1899, for the amount due from him on his stock under this call, and acted as president of the meeting of the directors May 21, 1900, when the board, by resolution, voted to apply the $250 advanced by him as counsel fees for the corporation on the unpaid portion of his stock subscription. Appellant's participation in all of these proceedings as stockholder, director, and officer of the board affords ample ground for an effective waiver of any irregularity in the call and notice thereof, and estops him from raising any objection as to their validity.

"A subscriber of stock may, by his acts or express agreement, waive a call itself, or informalities in its making, or notice thereof." *Kansas City H. Co. v. Harris,* 51 Mo. 464; *Stone v. Great Western O. Co.* 41 Ill. 85; *Danbury & N. R. Co. v. Wilson,* 22 Conn. 435; *Wis. River L. Co. v. Walker,* 48 Wis. 614, 4 N. W. 803; *State Bank B. Co. v. Pierce,* 92 Iowa, 668, 61 N. W. 426; Cook, Corporations, § 120. Such waiver and estoppel have been held binding on a stockholder in case of informalities under statutory requirements in mak-

ing calls and giving notice thereof. *Willamette F. Co. v. Stannus,* 4 Oreg. 261.

It is further argued that the court erred in not awarding judgment allowing appellant credit for the sum of $350, with interest, by way of setoff to any amount due from him to the respondent. The appellant, as president, employed counsel on May 19, 1900, to represent the corporation in litigation then threatened, before action was actually taken to declare the corporation insolvent and for the appointment of a receiver. He paid them the sum of $250 counsel fee upon the ground that it could not be procured from the treasurer, and that no other funds were available for that purpose. At a meeting of the board of directors May 21st following, this employment of counsel, and the sum advanced by him, were, by resolution of the board, directed to be applied as a payment on his unpaid stock subscription. The services performed by counsel under this retainer appear to have been exclusively for the benefit of the corporation. Respondent thereafter advanced an additional sum of $100 for services of counsel in the said litigation. It seems that the money so advanced and paid by appellant for counsel fees was, under the facts, a proper credit to be applied on his unpaid stock subscription, and should be allowed as a setoff in his favor in this action. Under the ruling of the court, such a setoff was erroneously denied. For such error the judgment must be reversed and a new trial ordered. This result makes any further discussion unnecessary.

By the Court.—Judgment reversed and a new trial ordered.

DALY, by guardian *ad litem,* Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

October 1—October 20, 1903.

Street railways: Nuisances: Running freight cars without authority: Liability for injuries: Negligence.

For injuries sustained by a traveler on a street, without fault on his part, caused by the running of freight cars upon street railway tracks without authority and in violation of law, the street railway company is liable, even though no specific negligence in the operation of such cars be shown.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an appeal from an order overruling a demurrer to a complaint which alleges, in effect, that the plaintiff is an infant eight years of age; that his father was duly appointed his guardian herein; that the defendant was duly incorporated under the statutes of this state, and at all the times mentioned authorized to operate street railways therein, and particularly in the city of Milwaukee; that the defendant derived its authority from certain ordinances of the city; that among others the defendant had a double-track street railway on Wells street from Eleventh street west to the city limits, upon which to run its cars, under the provisions of the ordinance, which, among other things, provided that "the said tracks and railway shall be used for no other purpose than the transport of passengers and their ordinary baggage, and the cars or carriages used for that purpose shall be of the best style and class in use on such railways;" that such provision has continued and remained in full force, and is a limitation upon the use which may be made of such tracks, and that no right has ever been granted in any form to the defendant to operate cars upon any of its tracks in the streets in the city of Milwaukee except for carrying passengers; that

during the year last preceding, at frequent but irregular intervals the defendant ran a large number of its trains upon its tracks in the city—including those on Wells street—propelled by electricity, adapted solely for carrying freight and heavy material, carrying no passengers, nor stopping to receive or discharge passengers, but running continuously from their starting point to their destination in the manner of ordinary freight trains, used only for carrying freight and heavy material for compensation or profit to the defendant, such freight and material being carried to and from places outside the city; that such freight trains so run in the streets of the city were dangerous to the community, and especially to children lawfully upon such streets, and that they have been so run by the defendant wholly without authority of law and in direct violation of law; that November 18, 1902, the defendant ran one of such trains consisting of five of such freight cars which had brought freight and heavy material over Wells street from beyond the city limits to some place in the city, and which was engaged in such traffic, and for the purpose of further hauling freight and material from beyond the city to some place within the same, said cars then being empty, westwardly on Wells street, without any authority and in direct violation of law; that such train was so run at a very high and dangerous rate of speed along such public street, passing street crossings at very frequent intervals, without giving signals, through a populous part of the city, passing schoolhouses when children were on their way home from school; that the plaintiff then being lawfully upon said Wells street, seeking to cross the same and exercising due care for one of his age, at the intersection of Twelfth street, was struck by said freight train of the defendant and thrown down thereby, partly under the wheels thereof, and one of his legs was crushed so that it had to be amputated, and a portion of his foot of the other leg lacerated, crushed, and torn so that a large part thereof had to be removed, subject-

ing the plaintiff to great pain and suffering, and crippling him for life, to his damage.

For the appellant there was a brief by *Spooner & Rosecrantz,* and oral argument by *C. P. Spooner.*

For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas,* and oral argument by *F. C. Winkler.*

Cassoday, C. J. Counsel for the defendant contend that the complaint fails to state a cause of action because it does not specifically allege any negligence of the defendant in operating the train or in the construction of the cars or the track or otherwise. It does allege that the defendant was only authorized to use its tracks and railway for transporting passengers. Had the injury resulted from the use of such passenger cars, there might have been some force in the objection. *Chicago & E. I. R. Co. v. Loeb,* 118 Ill. 203, 8 N. E. 460; *Randle v. Pacific R. R.* 65 Mo. 325. But the gravamen of the complaint is that the plaintiff was injured by reason of the defendant running freight cars upon its tracks without authority and in violation of law. The question whether an indictment would lie at common law against a corporation for a misfeasance was answered in the affirmative by the Queen's Bench many years ago. *Queen v. G. N. of E. R. Co.* 9 Q. B. 315, 325. In that case it was said by Lord Denman, C. J., that "a corporation . . . may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large." Id. 326. Thus, it has been held in Massachusetts that "a railroad laid out over and along a highway in such a manner as to obstruct it, without express statute authority or necessary implication, is liable to indictment as a nuisance." *Comm. v. O. C. & F. R. R. Co.* 14 Gray, 93. See, also, *State v. T. & B. R. Co.* 57 Vt. 144; *Evans v. C., St. P., M. & O. R. Co.* 86 Wis. 597, 603, 57 N. W. 354. So it is well settled that if an individual, without fault on his part, suffers special damage by any unlawful

act in obstructing a highway, he has a right of action therefor, although the party doing the act is also liable to an indictment for the same. *Thayer v. Boston,* 19 Pick. 514, 31 Am. Dec. 159; *Zettel v. West Bend,* 79 Wis. 316, 319, 48 N. W. 379, and cases there cited. Thus it has been held in New York that "the construction and maintenance of a street railway by any individual or association of individuals without legislative authority is a public nuisance, and subjects those maintaining it to a private action in favor of any person sustaining special injury therefrom." *Fanning v. Osborne,* 102 N. Y. 441, 7 N. E. 307. To the same effect, *Beekman v. Third Ave. R. Co.* 153 N. Y. 144, 152, 47 N. E. 277; *Stamford v. Stamford H. R. Co.* 56 Conn. 381, 15 Atl. 749; *Wellcome v. Leeds,* 51 Me. 313, 315. To the extent that the defendant exceeded its authority by running freight cars over its tracks without legislative permission, express or implied, it must be regarded as acting in violation of law, and hence answerable accordingly. This has, in effect, been repeatedly held by this court. *Evans v. C., St. P., M. & O. R. Co.* 86 Wis. 597, 603, 57 N. W. 354; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 513, 83 N. W. 851; *Allen v. Clausen,* 114 Wis. 244, 90 N. W. 181. Thus it is stated by a standard text-writer that

"for personal injuries sustained by a person by reason of any nuisance in a highway, or injuries thereby inflicted upon his team or property, the person creating the nuisance, as well as the person maintaining it, is always liable in a civil action, if the person injured was in the exercise of ordinary care when the injury was inflicted; and no degree of care on the part of the person erecting or maintaining the nuisance will exempt him from liability." 2 Wood, Nuisances (3d ed.) § 703.

The theory is that, the act being wrongful, the party doing it is answerable for all the consequences that flow therefrom to a person who is not chargeable with negligence by reason of which the injury is inflicted. Id. The allegations of the

complaint, if true, are sufficient to authorize a jury to find that the plaintiff's injuries were without fault on his part, and were actually caused by the running of the freight cars on the defendant's tracks in violation of law; and hence the complaint states a cause of action.

By the Court.—The order of the circuit court is affirmed.

DEUSTER, Appellant, vs. ZILLMER, Sheriff, Respondent.

October 1—October 20, 1903.

(1, 2) *Appealable order: Special proceedings: Entitling papers.* (3, 4) *Justices' courts: Judgments: Vacation in circuit court on motion: Officers* de facto.

1. Pending an appeal from a justice's judgment to the superior court, the latter court, upon motion of the appellant, made an order vacating the judgment. The motion papers and order were entitled in the action. *Held*, that the order was nevertheless one made in a special proceeding, and, being a final order affecting, at least, the substantial right to have a transcript of the judgment docketed, was appealable under subd. 2, sec. 3069, Stats. 1898.
2. Many special proceedings springing out of a pending action may properly be entitled in the action.
3. A circuit or superior court has no power to vacate a justice's judgment upon mere motion.
4. M. and H. were duly elected and qualified as justices of the peace, for the term of two years and until their successors should be elected and qualify. They were the only justices in the town, although it was entitled to four. At the next election H. was re-elected and three new justices were elected, none of them being designated on the ballots as the successor of M. One of the three new justices, whose residence was nearest to M., failed to qualify; and M., claiming for that reason to be entitled to hold over under his previous election, continued to act as a justice. *Held*, that he was a justice *de facto*, whose right to the office could not be questioned in a mere collateral proceeding.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

This is an appeal from an order vacating a judgment of an acting justice of the peace. The records show that on July 7, 1902, the appellant commenced a replevin action against the respondent before one James McIver, who was then acting as a justice of the peace in the town of Lake, Milwaukee county, and that appellant obtained judgment for the goods replevied, valued at $113.55, and for $76 damages and costs, July 10, 1902, from which judgment the respondent duly appealed to the superior court of Milwaukee county July 11, 1902, and the justice made his return upon such appeal August 18, 1902. After the filing of this return the respondent made a motion in the superior court to vacate and set aside the judgment of the justice, which motion was based upon the records and files in the case, and upon affidavits of the respondent and one Anton Haertl. The respondent's affidavit was simply to the effect that he was the sheriff of Milwaukee county, and that the judgment aforesaid was rendered against him as such sheriff. The material parts of Haertl's affidavit were as follows:

"I. That he was duly elected as one of the justices of the peace in the town of Lake, Milwaukee county, Wisconsin, on the 1st day of April, A. D. 1902; that he subsequently duly qualified for said office, and that he was duly declared elected by the proper authorities—all of which James McIver, Esq., his predecessor in office, had due notice.

"II. That the term of James McIver, Esq., expired on the 5th day of May, A. D. 1902; that said James McIver, Esq., was not re-elected, nor was he holding under any appointment, subsequent to said 5th day of May, A. D. 1902.

"III. That on the 6th day of May, 1902, deponent, having duly qualified for said office of the justice of the peace, duly demanded of said James McIver, Esq., as his successor to said office, the books and papers appertaining thereto.

"IV. That said James McIver refused to deliver to this deponent said books and papers, but for some time thereafter, and until he was ordered by the circuit court in and for Milwaukee county to deliver to this deponent all records, books, papers, and other property belonging to said office, which order was dated the 12th day of August, A. D. 1902, the said James McIver continued to act as said justice of the peace, although without any authority so to do by virtue of any election or appointment.

"V. That proceedings were finally commenced in the circuit court for Milwaukee county entitled, 'In the Matter of the Books and Papers Appertaining to the Office of the Justice of the Peace, Town of Lake, Milwaukee County, Wisconsin;' that the matter was fully heard before the Honorable Lawrence W. Halsey, Circuit Judge, and resulted in a court order, dated August 12, A. D. 1902, directing that said James McIver turn over to this deponent, as his successor, all books and papers in his possession as justice of the peace of said town of Lake, or in any way appertaining thereto, forthwith, upon service upon him of a copy of said order and that in default thereof said James McIver be declared in contempt of said order."

Upon the hearing of this motion the appellant appeared and filed the affidavit of James McIver, which had been used in the previous proceeding referred to in Haertl's affidavit, and reads as follows:

"James McIver, being first duly sworn, upon oath deposes and says that he is James McIver, justice of the peace of the town of Lake aforesaid, mentioned in the order to show cause herein; that, in answer to the said order to show cause, this affiant states that at the time of the annual election held in the town of Lake, Milwaukee county, Wisconsin, in the year 1900, and for many years prior thereto, this affiant was a resident and elector of the said town of Lake; that at the annual town election held in the town of Lake, Milwaukee county, Wisconsin, in the year 1900, affiant was duly elected a jus-

tice of the peace for said town aforesaid; that he duly qualified as such justice, according to law, by taking and subscribing the oath of office prescribed in section 809, Revised Statutes of Wisconsin, before a competent officer, and filed the same with the clerk of the circuit court for Milwaukee county, and by executing and filing with said clerk a bond, with two sureties, who were approved by the chairman and supervisors, as is provided by sec. 846, R. S. 1898; that he has ever since and is still acting as such justice of the peace in the town of Lake, by virtue of said election and qualification aforesaid.

"Affiant further says that prior to the election held in the town of Lake on the 1st day of April, 1902, there were in said town but two justices of the peace, to wit, James P. Howard and this affiant; that at the annual election held in the town of Lake on the 1st day of April, 1902, James P. Howard, Anton Haertl, George Voelker, and David H. Donna were elected justices of the peace of said town; that, as affiant is informed and believes, James P. Howard, Anton Haertl, and George Voelker qualified for said office; that the said David H. Donna, who was the nearest justice of the peace elected to this affiant, refused to qualify for the office of justice of the peace; that under the rule in force in the said town of Lake, and the construction placed upon the law by universal custom throughout the state of Wisconsin, and by the law department of the state of Wisconsin, as affiant is informed and believes, for more than a period of thirty years last past, the person residing in territory nearest to the justice in office, and who is elected over the incumbent in office, has been held to be the successor of such incumbent, and has been given the books and records of the office upon demand, when qualified, and when the nearest person failed to qualify according to law the incumbent held over, under section 15, article VII of the constitution of the state of Wisconsin; that David H. Donna being the nearest justice of the peace elected to this affiant, and he having failed to qualify as required by law, and under the practice and custom prevailing in the town of Lake and throughout this state for more than a period of thirty years last past, the said David H. Donna was the successor to the said affiant; and, said Donna having failed to qualify, the said affiant is advised and believes that he has

the right to hold over, under section 15, article VII of the constitution of the state of Wisconsin; and said affiant denies, upon information and belief, that the said Anton Haertl, of the town of Lake, is the successor to said affiant, and denies that he is entitled to the books, papers, and records pertaining to the office of justice of the peace, now held by this affiant.

"Affiant admits that on or about the 6th day of May, 1902, Anton Haertl made a demand upon this affiant for the books, papers, and records of the office of the justice of the peace, so held by this affiant; that said Haertl then and there states that he believed he had no right to demand or receive the books, papers, and records of the office of the justice of the peace, held by this affiant, but that he made the demand because the chairman of the town directed him to do so. Affiant admits that he refused to deliver said books, papers, and records to said Haertl, and then and there informed him that the chairman of the town had no authority in law to determine which of the four persons elected justices of the peace was elected as successor to this affiant, and said affiant still denies that said chairman had any such authority.

"Affiant further states that he is informed and believes that M. J. McNamara, the person named as being appointed justice of the peace in the town of Lake to fill a vacancy, derived no authority whatever by virtue of such appointment, and is not a justice of the peace of said town; that at the time of the said pretended appointment the board of supervisors of the town of Lake had no authority in law to make any such appointment, there being then no vacancies in the office of the justice of the peace of said town; that there were then four justices of the peace in said town, duly elected and qualified and acting as justices of the peace, to wit, James P. Howard, George Voelker, Anton Haertl, and this affiant, James McIver."

After hearing the motion the court, November 29, 1902, made an order vacating and setting aside the judgment of the justice, from which order this appeal is taken.

For the appellant there was a brief by *Julius E. Roehr*, and oral argument by *L. A. Brunckhorst*.

For the respondent the cause was submitted on the brief of *Durant, Price & Cowen.*

WINSLOW, J. The first question to be considered is whether the order appealed from is in fact appealable. If appealable, it can only be under the first or second subdivision of sec. 3069, Stats. 1898, which provide for appeals from the following orders:

"1. An order affecting a substantial right made in any action when such order in effect determines the action and prevents a judgment from which an appeal might be taken.

"2. A final order affecting a substantial right made in special proceedings or upon a summary application in an action after judgment."

If the order in question be an order made in the replevin action itself, then clearly it is not appealable. While it doubtless affected a substantial right, it was not made upon summary application after judgment; nor did it in effect determine the action, nor prevent judgment therein. All this seems self-evident. The judgment appealed from exceeded $15, exclusive of costs; hence the case was triable as if originally brought in the appellate court, and the mere fact that an order had been made purporting to vacate the judgment appealed from would not prevent the entry of a judgment in the appellate court. Stats. 1898, sec. 3768. Hence, in order to be appealable at all, it must be because it is a final order made in a special proceeding. While the question is not without some difficulty, we have concluded that it must be considered as an order made in a special proceeding. While all the papers on which the motion was founded, as well as the order itself, are properly entitled in the action, this fact is not at all conclusive. There may doubtless be many proceedings springing out of a pending action—such, for instance, as an application by one not a party to be allowed to interplead—which may very properly be entitled in the action, but are

none the less true special proceedings. *Carney v. Gleissner,* 62 Wis. 493, 22 N. W. 735. Our statute, after defining an action, declares that "every other remedy is a special proceeding." Stats. 1898, secs. 2595, 2596. This proceeding was certainly not an action of itself. It did not relate properly or necessarily to the disposal of the case on the appeal, because appellate jurisdiction was simply to dismiss or to try the appeal as an action originally brought in that court; hence it was not properly a proceeding in the action, but it was a proceeding of some kind, which sought and obtained a remedy. We see no course open, therefore, but to regard it as a special proceeding, ill-advised and erroneous doubtless, but nevertheless a special proceeding, within the meaning of the statute; and we are the more inclined to adopt this view from the fact that the parties and the trial court seem to have so considered it without objection. Viewing it as such, there can be no doubt of the appealability of the order, because it was final in the proceeding and affected a very substantial right. The justice's judgment was not affected by the appeal itself. It is true that the giving of an undertaking under sec. 3756, Stats. 1898, as was done in this case, stays the execution of the judgment; but, even when the undertaking is given, the judgment remains of force, and a transcript may be docketed pending the appeal. *Steckmesser v. Graham,* 10 Wis. 37; sec. 3669, Stats. 1898. So the making of an order vacating the judgment affected a substantial right.

We have not been referred to any authority which holds that a justice's judgment may be vacated upon mere motion made in an appellate court, even though that court has superintending control or supervisory jurisdiction, and we should be surprised to find any such authority in the absence of a statute to that effect. A court has power to amend or control its own records in a proper case by motion, but this principle has not, to our knowledge, been carried so far as to hold that it may amend, vacate, or expunge the records of another court

in that manner, even though such other court be an inferior court over which it has superintending control. This power of superintending control is to be exercised by the established writs of the common law, at least until the legislature shall provide additional or other means. *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081. That the circuit court has no power to set aside the judgment of a justice on mere motion was strongly intimated, if not actually decided, in the case of *Mabbett v. Vick,* 53 Wis. 158, 10 N. W. 84.

But if it were to be conceded that the power existed, or that the appellant, by appearing and failing to object to the proceeding, is now estopped from making any objection to the procedure, still the order was erroneous, because the facts before the court showed that the judgment was rendered by a *de facto* officer. It appears that McIver was duly elected and qualified as a justice in April, 1900. By the terms of the constitution his term extended for two years and until his successor in office should be elected and qualified. Const. art. VII, sec. 15. There were but two justices of the peace in the town of Lake prior to the election in April, 1902, McIver being one of them, and one Howard the other. The town was entitled to four justices, and four persons were elected at the last named election, one being Howard. Of the three newly elected justices, one failed to qualify; being the justice whose residence was nearest that of McIver. In this situation, McIver claimed that no successor had been elected to fill his place, and the question was certainly a debatable one. It did not appear that any of the persons elected had been designated on the ballot as the successor of McIver. Under these circumstances, McIver claimed to hold over under his previous election, and kept the books and records, and continued to do business as a justice, and, while that situation continued unchanged, rendered the judgment appealed from. It must be held that these facts fulfilled every requirement necessary to

constitute a *de facto* officer, so far as the public and those doing business before him were concerned. There was an office *de jure*. McIver was in possession under color of an election to that office. His right to hold it cannot be inquired into in a mere collateral proceeding. *In re Boyle,* 9 Wis. 264; *State ex rel. Knowlton v. Williams,* 5 Wis. 308. The cases of *State ex rel. Jones v. Oates,* 86 Wis. 634, 57 N. W. 296, and *La Pointe v. O'Malley,* 46 Wis. 35, 50 N. W. 521, are entirely inapplicable, because in those cases the question was simply as to the rights of one holding over in an office in a contest between himself and a person who had been declared duly elected to that identical office as his successor. Such cases involve very different considerations, and are controlled by different principles.

By the Court.—Order reversed, and cause remanded for further proceedings according to law.

RINGENOLDUS, Clerk, Respondent, vs. ABRESCH, imp., Appellant.

October 2—October 20, 1903.

Assignment for benefit of creditors: Action on assignee's bond: Debt incurred by assignee: Restoration of property to assignor before payment: Assent of creditor: Discharge of sureties.

1. The bond given by an assignee for the benefit of creditors is not an official bond, within the meaning of sec. 986, Stats. 1898.
2. The statutes (secs. 1698, 1700, Stats. 1898) relating to the filing of claims against the assignor, have no application to an indebtedness incurred by the assignee in executing the trust.
3. An action upon the bond of an assignee for breach thereof in restoring the property to the assignor before payment of an indebtedness incurred by the assignee in executing the trust, does not in any way attack an order discharging the assignee from all obligations as such to creditors of the assignor, especially where such order expressly required that the expenses of exe-

cuting the trust be paid by the assignor as a condition precedent to the restoration of the property.

4. Such partial or conditional discharge of the assignee did not relieve him or the sureties on his bond from liability in respect to the breach mentioned.
5. An attempt to collect the debt, so incurred by the assignee, from the assignor, who had agreed with the assignee to pay the same, was not such an election to rely upon the assignor's liability as would discharge the assignee.
6. The question whether the sureties on the assignee's bond would be bound by his contracts in carrying on the assigned business by order of the court, is not involved or determined.
7. Sec. 1701, Stats. 1898, providing for restoration of the property to the assignor only upon payment by him of the expenses of executing the trust, was intended not merely for the protection of the assignee, but also for the protection of persons who, by reason of dealings with the assignee, were entitled under sec. 1700 to liens upon the property.
8. Where a person to whom the assignee had become indebted in executing the trust, and who was entitled to a lien upon the assigned property for the amount of his claim, assented to the restoration of the property to the assignor without permission of the sureties on the assignee's bond, such sureties were thereby released from liability for the claim.
9. Assent of the claimant to the restoration of the property, in such a case, was sufficiently evinced by his conduct, where, after being notified that the assignee had released the property and taken an indemnity bond from the assignor to secure payment of the claim, he made no further effort to obtain payment in the assignment proceedings, but attempted to enforce the agreement of the assignor, making no claim against the assignee's bondsmen until several years later.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

Action on an assignee's bond, in the name of the clerk of the circuit court for Milwaukee county, for the benefit of the creditors of the assignee and the assignor. May 10, 1897, George Schweickhart made an assignment of his property in due form for the benefit of his creditors to Paul C. Biersach. The bondsmen of the assignee were Charles O. Manegold and *Charles Abresch.* There was an informality in the bond in

that it ran to the state of Wisconsin as obligee instead of the clerk of the circuit court for Milwaukee county. The property that came to the hands of the assignee was of the value of about $35,000 and included a factory for putting up various kinds of mineral and carbonated waters. The court having supervision of the execution of the trust authorized the assignee to continue operating the factory, which he did, and in so doing incurred an indebtedness to C. F. Leng of $1,563.23 for bottles between May 10 and October 1, 1897. $812.05 thereof remains unpaid. The assignee made a profit, by continuing the business, of $2,135.67. October 2, 1897, the time having expired for creditors to file claims, upon the petition of the assignee, assented to by the assignor, showing that all creditors who had filed claims had filed releases of the same in the office of the clerk of the circuit court for Milwaukee county, an order was entered discharging the assignee and requiring him to deliver all property in his hands as such assignee to the assignor on condition of the latter paying the fees and expenses and costs of court. Thereupon the trust property was delivered to the assignor without his first paying the indebtedness to Leng, who was not informed of the transfer till December 28, 1898, when the information in that regard came to him accompanied by an assurance from the assignee that the assignor had assumed and agreed to pay such indebtedness and given a bond to indemnify the former against liability on account of his having parted with the trust property in advance of payment being made. January 10, 1900, Schweickhart filed his petition in bankruptcy in the United States court for the Eastern district of Wisconsin, and such proceedings were subsequently taken in that regard that Leng filed in such court a claim for the aforesaid indebtedness against the bankrupt, and received thereon a dividend of $12.50, that being the full amount recoverable in such proceedings. The only recourse of Leng and others to whom Biersach became indebted as assignee and failed to pay or re-

quire the assignor to pay before returning the assigned estate to him, is upon the assignee's bond.

All the aforesaid facts were set forth in the complaint as a cause of action which Leng was entitled to prosecute in the name of the proper obligee in the assignee's bond, against the obligors. The prayer for relief, among other things, was for the substitution of the clerk of the circuit court for Milwaukee county as obligee in the bond in place of the state of Wisconsin. Defendant *Abresch* demurred to the complaint for insufficiency and the demurrer was overruled. He appealed from the order accordingly entered.

Louis G. Bohmrich, for the appellant.

For the respondent there was a brief by *E. J. Henning,* attorney, and *Kanneberg & Cochems,* of counsel, and oral argument by *A. Kanneberg.*

MARSHALL, J. The major part of appellant's propositions to support the claim that the court erred in overruling the demurrer do not seem to call for extended discussion. We will refer to them briefly.

It is said that the complaint fails to show performance of the condition precedent created by sec. 986, Stats. 1898. That regulates procedure in the enforcement of official bonds, not such as the one involved here.

It is further said that the complaint fails to show that plaintiff complied with the statutes in regard to the filing of claims by creditors of insolvents. This was not such a claim. The indebtedness accrued after the assignment, by contract with the assignee.

The next suggestion is that the complaint shows that the assignee was by order of the court discharged from all obligations as assignee to the creditors of the assignor, for any money or property that came to his hands, and that the order cannot be collaterally attacked. We perceive no attempt to attack the order collaterally or otherwise. This suit is not to

enforce the rights of a creditor of the assignor, but those of a creditor of the assignee having a right to a lien upon the assigned property, which the assignee, in breach of his duty and of his bond, has rendered valueless. The court expressly preserved that right, in that it ordered that the expenses of executing the trust should be paid by the assignor as a condition precedent to the trust property being restored to him.

The next point made is that Leng's remedy was under sec. 2832, Stats. 1898, for relief from the order. The answer to that is that he does not seek or want relief from the order. What he seeks is to recover his damages for a violation of the order.

Then it is suggested that the order discharged the principal and that such circumstance, upon familiar principles, discharged the surety. The trouble with that is that the principal was not discharged unconditionally. He was required to retain possession of the property till payment by the assignor of the expenses of executing the trust. That he failed to do, and it is for such failure, as indicated, that Leng complains.

Further, it is said that by Leng's filing his claim in the bankruptcy proceedings instituted by Schweickhart, he elected to rely upon the latter's liability, and so discharge the assignee. The rule invoked, it will readily be seen, has no application, since the enforcement of the claim against Schweickhart, as regards his personal liability, was perfectly consistent with holding the assignee likewise bound. Upon the facts alleged there was the situation, often met with, of a contract made by one person with another for the benefit of a third person, the latter being a creditor of the former and the benefit to flow to such third person being satisfaction of the first person's indebtedness to him. The beneficiary in such circumstances can assent to and sue on the contract made for his use without prejudice to the contractual liability of the original debtor till the actual discharge of the debt. *Stites*

v. Thompson, 98 Wis. 329, 331, 73 N. W. 774; *Kuhl v. C. & N. W. R. Co.* 101 Wis. 42, 57, 77 N. W. 155.

It is further suggested that it is a question for consideration whether the sureties in any event would be bound by contracts of the assignee in carrying on the assigned business, though done by order of the court. No such question is necessarily involved here. This suit is not grounded on the idea that the sureties became liable to Leng because the assignee incurred the indebtedness to him in operating the assigned business; but on the idea, as before iterated and reiterated, that the assignee failed to pay the expenses of administering the trust, part thereof being the claim of Leng, or to see that the assignor did so, as ordered by the court, before releasing the trust property, which Leng had a right to rely upon for his pay, and thus breached his bond.

Another point made is that the condition of the bond is that the assignee will pay over to the creditors of the assignor, existing at the time of the assignment, "all moneys," etc., and "abide the order of said court," and that respondent was not such a creditor. In that counsel seems to easily ignore the condition of the bond last stated, i. e., that the assignee will abide by the order of the court. It is the breach of that upon which this action is founded.

But it is said that failure of the assignee to insist upon the assignor's paying the expenses of executing the trust before turning over the trust property, is not an actionable breach of the bond, since the provision of the order in that regard was for the sole benefit of the assignee, and he could therefore waive it if he saw fit. Not so. Sec. 1700, Stats. 1898, made the expenses of executing the assignment a charge upon the assigned property to be paid before the claims of creditors, while sec. 1701 provides for a return of the assigned property, in the circumstances of this case, only upon proof being filed of the payment of all proved claims, and payment by the

assignor of the expenses of executing the trust. The latter section was evidently intended as much for the protection of persons entitled to liens upon the trust fund by reason of dealing with the assignee, as for the latter's protection.

The foregoing covers all the points raised by appellant's counsel except one. The manifest reason for treating them so briefly is because they seem obviously untenable. The remaining point appears to be fatal to the complaint. It is this: It appears upon the face of the pleading that Leng, without permission of the sureties, consented to the delivery of the trust property to the assignor upon his giving an indemnity bond to pay the former's claim. There is no principle better settled than that when there is a surety for the payment of the claim of another, and a property or a fund in the hands of the principal to which such other has a legal right to resort to collect such claim, if he consents to the release of such property or fund without permission of the surety, the latter is *ipso facto* discharged. Brandt, Suretyship & Guar. §§ 426, 429, 434. That is within the general rule that one secured of his claim against another by a surety owes to the latter a duty not to deal with his debtor to the prejudice of the surety. *Gardner v. Van Norstrand,* 13 Wis. 543; *Omaha Nat. Bank v. Johnson,* 111 Wis. 372, 87 N. W. 237; 24 Am. & Eng. Ency. of Law (1st ed.) 851, 856. The complaint shows that Leng was notified December 28, 1898, that the assignee had released the trust property to the assignor, and accepted in lieu thereof, to secure payment of his claim, an indemnity bond of such assignor. The inference from such circumstances that the release was assented to, seems clear beyond reasonable controversy. No effort was made by Leng in the assignment proceedings to obtain payment of his claim after receiving notice that an indemnity bond had been given for his benefit. The assignor's liability rested wholly on his agreement with the assignee, in consideration of which he received the trust property. The enforcement of that agree-

ment by Leng necessarily made him a party to it. Consistent with that he made no claim whatever against the assignee's bondsmen till nearly four years after the trust property was delivered to the assignor, and until after he became satisfied that he could not collect his claim out of Schweickhart and his sureties. It hardly goes far enough in favor of appellant to say that such facts show clearly implied assent to the release of the trust property and to the substitution of the promise of Schweickhart and his sureties in lieu thereof. They evince an express assent thereto, rendering obviously applicable the rule of law above stated. It follows that the demurrer to the complaint should have been sustained.

By the Court.—The order appealed from is reversed, and the cause remanded with directions to sustain the demurrer.

HUPFER, Administrator, Appellant, vs. NATIONAL DISTILLING COMPANY, Respondent.

October 2—October 20, 1903.

Nonsuit: Negligence: Death: Bursting of distillery vat: Evidence: Declarations as part of res gestæ: *Employee of corporation: Scope of authority: Photographs: Identification of objects: Review on appeal: Notice of injury, by whom given.*

1. In an action based upon alleged negligence of the defendant, if any reasonable probability of negligence may account for the event by inference from the evidence within plaintiff's control, defendant should be put to his proofs to supply the facts as to his own conduct, and plaintiff should not be nonsuited merely because he has not fully established those acts of which he can acquire knowledge only from the defendant or those in his interest.
2. In an action for the death of plaintiff's intestate caused by the bursting of a vat containing distillery slops, it is *held* that plaintiff's evidence tended to establish that the collapse of the vat was due to a weakening of the iron hoops from natural causes which the defendant should have anticipated

and guarded against, and might have supported an inference of defendant's lack of ordinary care; and that it was error, therefore, to grant a nonsuit.

3. Declarations of an employee of the defendant whose duty it was to sell slops from the vat and to control the manner of delivery, to the general effect that he had knowledge of the defective condition of the vat and hoops, made within five or ten minutes after the bursting of the vat and while he was rescuing and caring for plaintiff's intestate, who had been washed from the platform on which the vat stood and carried some distance down a hill by the flood of scalding slops, are *held* to have been a part of the *res gestæ*, and admissible as such, whether they could be regarded in the light of admissions or not; and error in excluding them was presumably prejudicial.

4. It having been shown that a certain officer or employee of the defendant corporation had full authority as to the disposition of the hoops after the bursting of the vat, and that he had directed that they be removed to a certain place, his subsequent identification of the hoops there, at the request and in the presence of one of plaintiff's attorneys and a photographer, was within the scope of his authority, and evidence thereof was admissible against the defendant.

5. The evidence on a second trial to prove that hoops shown in certain photographs were the hoops which came from the bursted vat is *held* so different from that on the former trial (discussed in 114 Wis. 279), that the decision upon the former appeal was not necessarily controlling upon the question of the admissibility of the photographs.

6. The question of the identification of objects photographed, as preliminary to the admissibility of the photographs in evidence, is one primarily for the trial court, and, so far as it is a question of fact, the conclusion of that court should not be overruled on appeal unless contrary to a clear preponderance of the evidence.

7. Under sec. 4222, Stats. 1898 (providing that no action for an injury to the person shall be maintained unless, within a year thereafter, "notice in writing, signed by the party damaged, his agent or attorney, shall be served," etc.), a notice signed by an attorney "for claimant," stating that plaintiff's intestate was instantly killed by the accident described, and that satisfaction is claimed by the plaintiff, administrator of the estate, is *held* sufficient, it not being necessary that the notice be given by the beneficiaries, the widow and children, or that it specifically notify the defendant of a claim for their damages.

APPEAL from a judgment of the superior court of Milwaukee county: JAMES O'NEILL, Judge. *Reversed.*

This action is between the same parties and arises out of the same facts as did that reported in 114 Wis. 279, 90 N. W. 191; this, however, being brought under sec. 4255, Stats. 1898, to recover for the benefit of the widow and children of the deceased, Simon Hupfer. The plaintiff offered evidence of a custom on the part of the defendant to sell distillery slops to the public generally from a large slop vat about sixteen feet in diameter, constructed of pine staves about three and one half inches thick, and surrounded by five iron bands or hoops three sixteenths of an inch in thickness; that customers were permitted, because they would not purchase otherwise, to themselves go upon a platform adjoining the tank in order to stir up the contents while drawing it off into their own receptacles; that Hupfer, a frequent customer through a series of years, was, on September 13, 1899, upon this platform, drawing off slops, when the hoops parted, the tank collapsed, and the contents washed him from the platform and down a hill a considerable distance, until stopped by a fence, whereby he was terribly scalded, and as a result died in a few hours after removal to a hospital. The breaking of the hoops was alleged to have been caused by defendant's negligence in failing to take proper care and precautions and in omitting proper inspection, whereby they had become so weakened as to be unsafe. At the close of the plaintiff's evidence the court made an order and later entered judgment of nonsuit, from which the plaintiff appeals.

Joseph B. Doe, for the appellant.

For the respondent there was a brief by *O'Connor, Schmitz & Wild,* and oral argument by *A. J. Schmitz.*

DODGE, J. I. Error is assigned upon the nonsuiting the plaintiff at the close of his testimony. The rule is, of course, familiar that such an order can be proper only when the

plaintiff's evidence, giving it the most favorable inferences reasonably possible in his favor, does not tend to establish his cause of action. *Lewis v. Prien,* 98 Wis. 87, 73 N. W. 654; *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 141, 88 N. W. 57; *Morton v. Smiley, ante,* p. 156, 96 N. W. 534. While the rule of law is the same, the practical restrictions upon the court are even greater in the face of a motion for nonsuit than they are upon the motion to direct a verdict after all the evidence is in, especially in a case of this sort, where the actual knowledge of the perils and precautions taken against them by the defendant are necessarily with it, and cannot well be made to appear in the plaintiff's case. If any reasonable probability of negligence may account for the event by inference from the evidence within plaintiff's control, the defendant should be put to its proof to supply the facts as to its own conduct, and the plaintiff should not be nonsuited merely because he has not fully established those acts of which he can acquire knowledge only from the defendant or those in its interest.

In the present case there was evidence tending to show that the vat in question was approximately five years old; that during all of its existence it had been used out of doors to contain distillery slops, which frequently overflowed and came in contact with the hoops, and which also were likely to percolate through the wood and come in contact with the interior surface of the hoops; that such slops contained acids and salts having the effect to disintegrate and eat away iron with which they came in contact, and that the officers of the defendant had knowledge of such tendency; that painting of the woodwork and the hoops would be a proper precaution against this result, whether from such chemicals or from atmospheric influence, but would have to be repeated frequently to be effective, certainly more than once a year. There was evidence tending to prove that the wooden parts had never been painted, and that the iron hoops had not been for at least

two years prior to the collapse. Evidence also tended to establish that the breakage was due to the eating away of the hoops; that such rusting was mainly on the inside toward the tub, but that it was also discoverable upon the outside of the bands; and there was verbal testimony that in places rust had eaten away portions of the hoops which were examined by the photographer, Breitwish. There is also the fact that the hoops did part while the tub was being used according to ordinary custom, and there was in this case, at the stage when terminated, entire absence of proof as to the ordinary life of vats of this sort or as to how often the hoops needed to be renewed. The evidence thus summarized, if believed by the jury, as it might have been, although thrown in conflict in some respects by other testimony, certainly tended to establish that the collapse of this vat was due to the weakening of the hoops from natural causes such as might well have been anticipated and by more diligence guarded against by the defendant, and might well have supported an inference of fact that the conduct of the defendant in permitting this condition to develop, and in exposing the decedent thereto, was not the care exercised under such circumstances by people of ordinary care and prudence. In our judgment, the order of nonsuit was erroneous. The defendant should have been put to its proof, to rebut, if it could, the inference of negligence resulting from the facts which the jury might have found at the time when the motion was made.

II. *Exclusion of evidence.* (a) The first ruling complained of under this classification was upon an offer to prove a declaration made by the witness Dordel, to the general effect that he had knowledge of the defective condition of the vat and hoops. Dordel was an employee of defendant, whose duty it was to sell slops from the tank to customers and to control the manner of delivery, i. e., in permitting customers to go to the place where deceased was when injured. The circumstances of the declaration were, as related by witness

Mrs. Koepp, substantially as follows: She lived across the street, less than 200 feet from the tank, saw it burst, and plaintiff's decedent disappear. She ran downstairs, out of her house, and across the street, where she met Dordel, also going to the place of the accident, with whom she went to the place where deceased lay struggling in the scalding liquid. Dordel rescued him, and brought him part way up the hill, and undertook to care for him. In the course of these transactions, and within five or ten minutes after the bursting of the tank, Dordel made the declarations sought to be proved as part of the *res gestæ*.

The rule that declarations which are part of the *res gestæ* may be given in evidence is, of course, familiar. It rests upon the theory that an event which is relevant is not complete unless the whole may be given, including the spoken words which constitute part of it. Such evidence is deemed safe because of the improbability that utterances will be untrue or fabricated while the mind of the speaker is engrossed with the act itself. The words must be part of the event, and to this end they must be so nearly concurrent in time as to warrant belief that they are spontaneous utterance of the thoughts instantly engendered by the event. They must not be in the nature of a narrative of the fact after it has fully transpired, the fruit of memory, or possibly of fabrication after opportunity to deliberate. The subject has been many times discussed and the rule applied in Wisconsin. A few of the cases in this court and elsewhere suffice. *Mack v. State,* 48 Wis. 271, 4 N. W. 449; *Hooker v. C., M. & St. P. R. Co.* 76 Wis. 542, 547, 44 N. W. 1085; *Hermes v. C. & N. W. R. Co.* 80 Wis. 590, 592, 50 N. W. 584; *Reed v. Madison,* 85 Wis. 667, 56 N. W. 182; *Christianson v. Pioneer F. Co.* 92 Wis. 649, 653, 66 N. W. 699; *Bliss v. State,* 117 Wis. 596, 94 N. W. 325; *Mullan v. P. & S. M. S. Co.* 78 Pa. St. 25, 33; *Elkins v. McKean,* 79 Pa. St. 493; *Shafer v. Lacock,* 168 Pa. St. 497, 32 Atl. 44; *Louisville & N. R. Co. v. Foley,* 94 Ky.

220, 228, 21 S. W. 866; *International & G. N. R. Co. v. Anderson,* 82 Tex. 516, 519, 17 S. W. 1039; *Keyser v. C. & G. T. R. Co.* 66 Mich. 390, 394, 33 N. W. 867; *State v. Murphy,* 16 R. I. 528, 17 Atl. 998; *Comm. v. Hackett,* 2 Allen, 136, 139; *Senn v. Southern R. Co.* 108 Mo. 142, 18 S. W. 1007; *Jack v. Mut. R. F. L. Asso.* 113 Fed. 49.

We cannot agree with the contention that the declaration offered was after or separated from the transaction or event under consideration; for it was made, according to the evidence, while the victim was being rescued and cared for, and in the full heat and excitement of the catastrophe. The event in hand was not alone the bursting of the vat, but included the admission of decedent to the place of peril, the sweeping down hill of the decedent, his struggles, and his rescue and care at the place of injury. There was not nearly so much termination of the transaction as in *Bliss v. State, supra.* It is also intimated by counsel in argument that the remarks were of the nature of an exclamation of remorse over the tragedy such as would spring naturally and spontaneously from a state of mind momentarily developed by the sight. While we cannot know the exact character of the declaration, it suffices that the words may have been such as to be clearly material and unpremeditated. Being spoken, however, in and as a part of a transaction which itself was relevant and material, the declaration was admissible, and its exclusion error, from which prejudice must be presumed unless the contrary clearly appear. *Hermes v. C. & N. W. R. Co.* 80 Wis. 590, 50 N. W. 584. This conclusion does not rest on the fact that Dordel was defendant's employee or agent, but that he spoke as a participant in the events.

(b) Appellant also assigns error on the exclusion of testimony that one Miller, five days after the catastrophe, on request of one of plaintiff's attorneys, pointed out to him and to a photographer certain hoops as the hoops which had been around the exploded tank; it being claimed by appellant that

Miller's act in so doing was within the scope of his authority as an employee of the defendant corporation. It appeared by the testimony of the secretary of the company that Miller "was chief engineer and superintendent of machinery and apparatus, sort of foreman over the mechanics, engineer, and laborers around the yard,—everybody except the experts. . . . The mechanical part of the plant, the machinery and apparatus, was under the supervision of Mr. Miller. He was at the head, but was not manager, of the business. . . . He was next in rank to the general officers, except the chemist. It was the business of Mr. Miller, and possibly of Mr. Wedring, to see that the hoops and staves and material generally from the bursted tank was cleared away and taken care of. His direction in that regard would be authorized by the company." Immediately after the accident, he gave direction that the hoops should be removed to a certain small yard, described as back of the carpenter shop, and that the staves be otherwise disposed of. Some months later he sold these hoops as old iron. The testimony excluded was that he, on request of plaintiff's attorney, pointed out these hoops and said they were the same which came from the broken tank.

The rule of law is entirely well settled that, when an agent is vested with authority to perform any business for his principal, his words, his verbal acts, in conducting that business and in relation thereto, are the acts of the principal and may be proved as against the latter. *Hazleton v. Union Bank,* 32 Wis. 34, 48; *Scott v. Home Ins. Co.* 53 Wis. 238, 10 N. W. 387; *Morse v. C. R. R. Co.* 6 Gray, 450; *McGenness v. Adriatic Mills,* 116 Mass. 177; *Green v. Ophir C., S. & G. M. Co.* 45 Cal. 522; *Austin v. Chittenden,* 33 Vt. 553; *Weeks v. Barron,* 38 Vt. 420; *Midland L. Co. v. Kreeger,* 52 Mo. App. 418; *Ayres v. Hubbard,* 71 Mich. 594, 40 N. W. 10; *Richards v. Murphy,* 1 Whart. 185; *Baker v. Westmoreland & C. N. G. Co.* 157 Pa. St. 593, 27 Atl. 789; *Halsey v. L. V.*

R. Co. 45 N. J. Law, 26, 34; *Murray v. Weber,* 92 Iowa, 757, 60 N. W. 492; *Cheney v. Beaty,* 56 Ill. App. 90; *Toll Bridge Co. v. Betsworth,* 30 Conn. 380, 391; *Xenia Bank v. Stewart,* 114 U. S. 224, 228, 5 Sup. Ct. 845; 2 Jones, Ev. §§ 359, 360. This rule is especially applicable to corporations, which can speak and act only through agents. Justice to the rights of others requires that acts of such intangible entities must be significant, and the basis for conduct by others, as in the case of individuals. When, therefore, a corporation selects an individual to do an act in its behalf, the individual, in doing that act, i. e., within the scope of his authority, is, in legal effect, the corporation doing it. This, too, whether he be one of the highest of general officers or a mere temporary employee. The evidence, quite without dispute, establishes that all contact of the corporation with these retired hoops was intrusted to Miller, as well as control of the place where they were. If the hoops were to be identified by the corporation, or to be exhibited to plaintiff's attorney or concealed from him, Miller was obviously the officer to do such act. No one else had any such authority, and no one else had any knowledge on the subject. Surely, exclusion of plaintiff from inspection of the hoops, or their suspicious destruction, if material against the company as suppression of evidence, would be provable by acts of Miller, and in such acts his words characterizing them would be alike admissible. There can be no distinction between such acts and the contrary one of permitting inspection. When plaintiff's attorney applied to Miller for identification and inspection of the hoops, he applied to the corporation. When Miller admitted the attorney to the premises, and led him to the spot, the corporation was responding to that application, and when Miller declared those the hoops desired the words characterized the act; they were integral to it, and as much emanated from the corporation as did the act of admission to its prem-

ises. We cannot avoid the conclusion that identification of these hoops by Miller was admissible as evidence against the defendant, and exclusion thereof was error.

(c) A further assignment of error is predicated on the rejection of certain photographs taken four or five days after the accident, claimed to exhibit the hoops which came from the broken vat, and which, if admissible, would have shown an advanced stage of decay and deterioration and elucidated the photographer's verbal description of their condition. The court, in making the ruling, declared his view, as an original proposition, that the identification was sufficient, but felt himself constrained, by the decision of this court in the previous case, to hold the contrary. In this respect we think he was mistaken. A comparison of the evidence of identification contained in the printed case in the former action and that now before us shows a very marked difference, not only in the specific facts of which testimony was given, but also in respect to the clearness and definiteness of evidence to facts which were in some degree suggested in the former case. Thus, it was proved, substantially without dispute, that the hoops taken from the tank were placed at the spot where were the hoops photographed, and there was no pretense that they had been moved. There was evidence, disputed it is true, that no other hoops were at that particular place, although others were scattered about in the yard in the general vicinity. It was also undisputed that the hoops in question were covered with the grain or meal which formed the solid part of the slops; that none of the other old hoops which had previously been thrown in the same general vicinity had any such grain or meal upon them. The defendant's engineer, Miller, testified that the hoops in the photograph looked like the hoops from the vat; also that the hoops from the vat were easily distinguishable from the old ones by the fresh slops clinging thereto and by the fresh appearance of the inside surface of the hoops, the rust thereon differing in appearance from that

on hoops which had been longer exposed to the weather on both sides. With this evidence to identify the hoops which came from the vat, the witnesses who took the photographs testified that the hoops so photographed were noticeable by reason of fresh slops adhering thereto; that they were also distinguishable from other old iron by the peculiarity of the inner surface; and that there were no other hoops in the pile with those photographed which agreed substantially in quantity with those which came from the vat. This state of the evidence certainly presents a very strong case of identification, and was, as we have said, in many respects differentiated from that which was reviewed on the appeal in the former case; we think sufficiently so differentiated that the trial court might well have considered his judgment uncontrolled by our former decision.

The question of identification, as preliminary to the admissibility of the photographs, was, however, one for the court and not primarily for the jury, and, so far as it was a question of fact, the conclusion of the trial court upon the evidence must be given great weight upon appeal—substantially the same weight as is given that court's findings upon other issues tried without a jury. All of the advantages of observation of witnesses, understanding of the application of testimony to known facts, and the like, are the same in one case as the other, and only where the appellate court can say that the identification is established by a very clear preponderance of the evidence should it overrule the conclusion of the trial court thereon. Such weight is accorded the decisions of trial courts generally upon the various questions of fact arising as preliminary to a ruling upon competency of witnesses or admissibility of particular evidence. *Emery v. State,* 101 Wis. 627, 78 N. W. 145; *Nelson v. Sun Mut. Ins. Co.* 71 N. Y. 453, 461; *Slocovich v. Orient Mut. Ins. Co.* 108 N. Y. 56, 62, 14 N. E. 802; *Johnson v. Arnwine,* 42 N. J. Law, 451, 458; *Granniss v. Irvin,* 39 Ga. 22; *Gorgas v.*

Hertz, 150 Pa. St. 538, 24 Atl. 756; *Maughan v. Burns' Est.* 64 Vt. 316, 23 Atl. 583; *Jones v. Tucker,* 41 N. H. 546; *Bain v. Walsh,* 85 Me. 108, 26 Atl. 1001; *Page v. Page,* 15 Pick. 368, 374; *Walker v. Curtis,* 116 Mass. 98; *Blair v. Pelham,* 118 Mass. 420; 1 Greenl. Ev. (15th ed.) § 425. In some jurisdictions it is intimated, indeed, that such decisions by trial courts will not be reviewed on appeal, but we are not prepared to carry the rule of conclusiveness further than we have suggested.

In view of the deference due to a deliberate conclusion by the trial court as to sufficiency of the identification, we might hesitate, even in the present case, to overrule such conclusion and hold it reversible error. Resolution of the doubt on that question is, however, not necessary, as reversal must result upon other grounds, and upon a new trial the positive identification by defendant's engineer may substantially vary the situation.

III. Respondent urges, as justification for the nonsuit, insufficiency of the notice of injury required by sec. 4222, Stats. 1898. That notice was signed, "Lindley Collins, Attorney for Claimant," described the accident, and declared that Hupfer was instantly killed, and that satisfaction is claimed by *George Hupfer,* administrator of the estate. It is contended that the notice must have been given by the beneficiaries, the widow and children, and must notify the defendant of a claim for their damages. The sufficiency of this notice is fully established by *Parish v. Eden,* 62 Wis. 272, 22 N. W. 399; *McKeigue v. Janesville,* 68 Wis. 50, 31 N. W. 298; *Carpenter v. Rolling,* 107 Wis. 559, 83 N. W. 953.

By the Court.—Judgment reversed, and cause remanded for a new trial.

ORNSTEIN, Respondent, vs. YAHR & LANGE DRUG COMPANY, Appellant.

October 2—October 20, 1903.

Master and servant: Entire contract of employment: "Working days," when include Sundays: Wrongful discharge: Election of remedies: Single recovery.

1. A contract by which plaintiff agreed to act as traveling salesman for defendant from April 1, 1900, to December 31, 1900, at a salary of $1,000 per year and expenses, and providing that a failure by either party to faithfully carry out his part of the agreement should be sufficient cause for termination of the contract by giving thirty days' notice, is *held* to have been an entire contract, although prior to his discharge plaintiff had been paid in monthly *pro rata* instalments.
2. Under a contract for the employment of a traveling salesman, providing that he should be paid his expenses, "not to exceed an average of $7 per working day," all Sundays actually spent in the service should be included as working days, in calculating such average.
3. After the wrongful discharge of one employed under an entire contract, he may elect to treat the contract as rescinded and recover on a *quantum meruit* for services actually rendered, or may sue, either before or after the expiration of the agreed term of service, for damages actually resulting from the breach; but an election of either remedy will be a waiver of the other, and one recovery of damages for the breach, though it be only of the *pro rata* amount for one month's service, will be a bar to any subsequent recovery.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Appellant engaged respondent as a traveling salesman for a period beginning April 1 and ending December 31, 1900. The agreement provides in part that he was

"to act in the capacity of a cigar salesman for them, and sell their goods in the territory selected by them, in harmony with their wishes, and in keeping with their instructions from time to time as necessity may demand; for which services they agree to pay him a salary of one thousand ($1,000) dol-

lars per year and expenses, the latter not to exceed an average of seven ($7) dollars per working day, with the distinct understanding that same shall be kept as much less than this amount as possible and represent them properly.

"Furthermore, it is mutually agreed that a failure on the part of either party to faithfully carry out his part of the contract will be considered sufficient cause for the termination of this contract by giving thirty days' notice."

Respondent worked from April 3d to June 29th. He reported Sunday among the number of his working days when he was actually engaged in working on that day, and included the expenses of that day as the expenses of a working day. It appears that appellant treated the expenses of Sunday as proper in arriving at the total amount of expenses, but insists Sunday should not be included as a "working day" in computing the average daily expenses, which were limited to "seven ($7) dollars per working day." Including Sunday, the expenses per working day for the whole period during which respondent was actually employed average less than $7; excluding it, the amount is more.

On July 1st respondent was notified that his services were no longer desired, for the reason that he had breached the contract by exceeding the average daily expense specified therein. In August he brought an action in justice's court, and recovered an amount equal to a month's *pro rata* salary. After the contract period had expired, this action was brought to recover damages for the breach of the contract in wrongfully dismissing him from service. Respondent alleged his damages were equal to the difference between the amount received and the total salary he was to receive for the period of service. Judgment was awarded for that amount, with costs, amounting to $464.15. From that judgment this appeal is taken.

For the appellant there was a brief by *Nath. Pereles & Sons,* and oral argument by *C. F. Hunter.*

W. B. Rubin, for the respondent.

SIEBECKER, J. The terms of employment of respondent by appellant are embodied in a written contract specifying the nature of the service, the compensation to be paid therefor, and the amount to be allowed as expenses in rendering the services. The contract must be treated as embodying the agreements of the parties concerning the employment, and fixing the duties which devolve upon either party arising from this relationship. It is important at the outset to ascertain whether this agreement admits of being treated in law as an entire and indivisible one, or as one separable, divisible, and apportionable. This agreement contains the express promises whereby the appellant engaged respondent for the definite period beginning April 1, 1900, and ending December 31, 1900, to represent them and render the services of a traveling salesman in the territory to be selected by them under their instructions and "for which services they agree to pay him the salary of one thousand ($1,000) dollars per year and expenses, the latter not to exceed an average of seven ($7) dollars per working day." The respondent agreed to accept such employment and render service in the most advantageous and profitable manner. It is further stipulated that a failure by either party to fulfill this agreement shall be grounds for its termination upon thirty days' notice.

The intent of the parties is manifest by the terms and condition of the agreement. A consideration thereof discloses the fact that the mutual obligations imposed were concurrent acts, requiring each party to perform his part, and that an entire fulfilment of the promise by either preceded the right to compel performance on the part of the other. The amount of the consideration to be paid by the appellant is certain and definite and is dependent upon the performance of the services by respondent for the fixed period. The services for the period defined are the consideration of the promise to pay the salary. Under these circumstances the benefits and value of

the services for a part of the period cannot, in legal contemplation, be apportioned on a *pro rata* basis. If either party desired such an apportionment, he should have insisted that the terms of the agreement expressly provide for it. It is argued that the terms of the contract as written should be held apportionable upon the ground that the sums paid thereon by appellants were the *pro rata* amount for the service rendered before payment. This cannot control, since the terms of the agreement are plain and definite and readily understood under rules applicable to the construction of such agreements. It has frequently been held that, if there is an express promise to pay a definite sum as compensation for a prescribed period of service, it is an entire promise made for the whole service of the contracted period, and if instalments are paid they are not in payment of so much of the services rendered to the date of payment, but are merely an advance of part payment for the whole period for the convenience of him receiving it. We must hold that the contract is entire, under the decisions of this court beginning at an early date in *Gordon v. Brewster,* 7 Wis. 355, and continuing to the recent case of *Glidden v. Meyer,* 110 Wis. 1, 85 N. W. 656. *Jackson v. Cleveland,* 15 Wis. 107; *Trowbridge v. Barrett,* 30 Wis. 661; *Jennings v. Lyons,* 39 Wis. 553; *La Coursier v. Russell,* 82 Wis. 265, 52 N. W. 176; *Winkler v. Racine W. & C. Co.* 99 Wis. 184, 74 N. W. 793. See, also, 2 Parsons, Contracts, 633, 634.

Exception is taken to the court's construction of the provisions of the contract pertaining to expenses of respondent while in the performance of his services. The contract states in terms that respondent's expenses connected with the service were to be paid in addition to the salary, and that such expenses were "not to exceed an average of seven ($7) dollars per working day." It is contended by appellant that no Sunday should be included to determine the total number of days for which expenses are to be allowed, though respondent

actually spent Sunday in the service away from his home. The nature of the employment and the services to be performed must be considered in giving legal significance to this provision. Obviously, respondent was to travel on the road, which required him to spend some of his Sundays away from his home, subjecting him to the usual daily expenses of his trip, and when required to travel by railway on Sunday, as appears the business might actually demand, his expenses would be no different nor less necessary than on other days. It must be assumed that the parties contracted having these circumstances in view. It was proper and competent to make provision for payment of expenses for Sundays actually spent in the service as "working days" in fixing the amount to be allowed therefor. All Sundays actually spent in the service we think must be included in calculating the average of expense per "working day." Under this view we find that the expenses incurred by respondent while in the actual service were less than the sum of $7 per day. From this it follows that respondent had not breached the contract, as claimed by appellant, on July 1st, when they notified him that his services were no longer desired.

Respondent tendered his services and offered to continue in his employment after such notice, but was prevented by appellant. The evidence shows that he was voluntarily paid in full for the services actually rendered by him before July 1st, and that he rendered no services thereafter. He admits that he instituted an action against appellant in the month of August, after being dismissed from the service. It is asserted in his behalf that this admission cannot be held to bind him as having recovered any damages sought to be recovered in *this* action. It sufficiently appears from his evidence that he brought that action after his discharge; that he recovered an amount equal to a month's *pro rata* salary, with costs, and that the same was paid him by appellant. Nothing appears to contradict this state of facts. The question, then, arises,

What are the legal results consequent on this recovery by respondent?

Since there was an entire contract, a material breach on the one side as to any part of its terms justified a refusal by the other side to be thereafter bound by any of its provisions. The wrongful dismissal of respondent from service by preventing him from continuing in the employment constituted a breach of the entire contract, and furnished him the occasion to invoke legal relief. He being free from fault, the law awarded him two remedies. He had a right to act on the breach and declare the contract rescinded, and recover upon *quantum meruit* for any services actually rendered; or bring his action at any time before or after the expiration of the prescribed period of service fixed by the contract for the damages actually resulting to him from the breach. With these two alternatives before him, he was required to elect which remedy he would pursue, and whichever one he adopted was in itself a waiver of the other, for the law will not permit him to pursue two remedies to recover damages flowing from one wrong. When he pursued either remedy, he exercised the legal right of choice between these remedies, of which he was entitled to but one, and when he elected the one he waived his right to the other. *James v. Allen Co.* 44 Ohio St. 226, 6 N. E. 246; 2 Smith's Lead. Cas. p. 9 *et seq.*, and cases cited.

It is not suggested that respondent treated the contract as rescinded and sought recovery before the justice upon *quantum meruit* for services actually rendered. This he could not do consistently with his subsequent course of action. Such rescission would in itself declare the contract abrogated, and no action for damages for its breach could be maintained. He expressly alleges in his complaint in this action "that by reason of such wrongful breach of the contract by said defendant, said plaintiff sustained damages in the sum of $416.65," and demands judgment therefor, with costs of ac-

tion. Having elected to stand on his right for damages by reason of the breach, he was confined to that remedy before a justice, and he is presumed to have exhausted his damages in that action. There being only one breach, but one cause of action could arise therefor. It became his legal duty to include all his damages in one recovery. The law does not permit a splitting up of a cause of action into different recoveries. The principle is clearly stated in the case of *James v. Allen Co., supra,* in the following language:

"Where an employee is wrongfully dismissed, but all wages actually earned up to that time are paid, the only action the employee has, whether he brings it at once or waits until the entire period of hire had expired, is one for damages for breach of the contract. And the measure of damages will be the loss or injury occasioned by such a breach, and one recovery upon such claim, whether the damages are denominated 'loss of wages' or 'damages for breach,' is a bar to a future recovery."

Winkler v. Racine W. & C. Co. 99 Wis. 184, 74 N. W. 793, and cases cited; Wood, Master & S. 246; *Keedy v. Long,* 71 Md. 385, 18 Atl. 704; *Olmstead v. Bach,* 78 Md. 132, 27 Atl. 501; *Howard v. Daly,* 61 N. Y. 362; *Clossman v. Lacoste,* 28 Eng. L. & E. 140; 2 Smith's Lead. Cas. 41; *Lake Shore & M. S. R. Co. v. Richards,* 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33; *Hosmer v. Wilson,* 7 Mich. 294; *Goodman v. Pocock,* 15 Q. B. 576; *Davis v. Ayres,* 9 Ala. 292.

We must hold that the contract for services was an entire one; that respondent's election to prosecute the action before the justice exhausted his rights to sue on a breach of the contract, and constitutes a bar to the recovery sought to be enforced in this action.

By the Court.—The judgment of the lower court is reversed, and the cause is remanded with directions to enter judgment dismissing respondent's complaint.

THE STATE EX REL. WEBER, Respondent, vs. BOARD OF TRUSTEES OF THE POLICEMEN'S PENSION FUND, Appellant.

October 2—October 20, 1903.

Policemen's pension fund: Retirement for disability: Conditions precedent: Examination and finding: Waiver: Mandamus.

Sec. 8, ch. 265, Laws of 1899, provides that if any policeman shall be injured while on duty and shall be "found, upon an examination by a medical officer ordered by said board [of trustees of policemen's pension fund], to be . . . permanently disabled by reason of service in such department," such board shall retire him from service, and upon such retirement shall order payment of a pension to him; but no such retirement shall occur unless the disability was contracted in the active service of the department. In a proceeding by *mandamus* to compel the board to order payment of a pension, it is *held* that the examination and finding of permanent disability by reason of service in the department are conditions precedent to the retirement, and that the provisions of the statute, being express limitations upon the power of the board, could not be waived by it, even though permanent disability of the relator be conceded.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

This is an appeal from an order refusing to quash an alternative writ of *mandamus.* It appears from the relation, in effect, that the relator was a married man, forty-four years of age; that he entered the service of the city of Milwaukee as a patrolman January 2, 1890, and continued in such employment until injured, May 27, 1901. His salary was $80 per month, out of which, after June, 1899, $2 per month was deducted and placed in the policemen's pension fund, pursuant to ch. 265, Laws of 1899. He remained on the pay roll until May 1, 1902. May 27, 1901, at 6:42 p. m., he rang in his time, and reported "off duty" for the day, from a patrol box within his beat. The time for him to go off duty for the day

was 6:45 p. m., but a leeway of five minutes either way was allowed by the department. Just after ringing up his time a street car passed him, going in the direction of his home, having a sign thereon, "No passengers," but was required by the ordinance granting the street railway its franchise to carry policemen in uniform free of charge. It was the custom of the operators of the car in question to "slow up" for policemen in uniform, but it is not claimed that the car in question "slowed up" for the relator. The relator was in uniform, and, for the purpose of getting home, attempted to board the moving car at the front platform. In doing so he tripped and fell, and his left leg was run over and crushed so as to necessitate amputation four inches above the ankle. This injury permanently disabled the relator, so as to render necessary his retirement from the service of the police department.

On June 17, 1902, the relator made application to the defendant board for a pension, under ch. 265, Laws of 1899, and filed his claim therefor on that day; and on January 12, 1903, the board denied the pension, making written findings of fact substantially as above set forth, and reciting that, on a motion to allow the pension, three of the board voted in the affirmative, and three in the negative—"three of the board were of the opinion that, as a matter of law, the petitioner was entitled to a pension as patrolman under the law, and therefore voted to give him a pension, and three others were of the opinion that, as a matter of law under the foregoing facts, the petitioner was not entitled to a pension, and voted against the granting of the pension for that reason, and therefore the petition of the petitioner for a pension was denied" by reason of such tie vote.

The car which the relator so attempted to board traveled four blocks from the place of the accident before getting beyond the limits of the relator's beat, beyond which the relator had to ride about a mile and a half to get home, if he

went as far as he could on the car. Various rules and ordinances are quoted in the relation, which are to the effect that a patrolman shall hold himself in readiness at all times to answer the calls and obey the orders of his superior officers. He must reside in the city, and must not leave it without permission, except on his vacation, and he must then leave his address. He must devote his whole time and attention to the business of the department, and may not engage in any other calling, and, "although certain hours are allotted to the respective members for the performance of duty on ordinary occasions, yet at all times, when notified, he must be prepared to act immediately." He shall not wear citizen's clothes without permission. He may serve criminal process, and civil process when the city is not a party, and possess the powers of a constable at common law. He is required to arrest all persons found violating any law or ordinance, or found under suspicious circumstances, and if he neglects to perform any duty required of him shall forfeit a penalty of not exceeding $100.

Upon such relation the defendant moved the court to quash the alternative writ of *mandamus* issued February 3, 1903, and to dismiss the order to show cause therein made by the court on that day, and to dismiss the petition upon which the writ was issued, and all proceedings therein, with costs, upon the grounds (1) that it appeared upon the face of the petition that the court had no jurisdiction to grant the relief prayed for therein; (2) that the petition and the alternative writ of *mandamus* do not, and neither of them does, upon its face, state facts sufficient to entitle the relator to the peremptory writ of *mandamus* as prayed, or to any relief. Upon the hearing of such motion, the court, on April 4, 1903, ordered that such motion of the defendant to quash be, and the same was thereby, overruled and denied, with leave to serve and file a return on payment of costs, etc. From the

order so refusing to quash the alternative writ of *mandamus,* the defendant appeals.

For the appellant there was a brief by *Hoyt, Doe, Umbreit & Olwell,* and oral argument by *J. B. Doe.*

John Toohey, for the respondent.

CASSODAY, C. J. The correctness of the decision of the trial court depends upon the construction to be given to the statute which declares that:

"If any member of the police department shall while engaged in the performance of his duty as such policeman be injured *and found upon an examination by a medical officer ordered by said board* to be physically or mentally permanently disabled by reason of service in such department so as to render necessary his retirement from service in such department, such board shall retire such disabled member from service: provided, no such retirement on account of disability shall occur unless the member has contracted such disability while in the active service of such department. Upon such retirement the board shall order payment to such retired member, monthly, from such pension fund a sum properly payable according to his grade, to wit: . . . patrolmen thirty-five dollars." Sec. 8, ch. 265, Laws of 1899.

A prior section of the act gave to the board "exclusive control and management of the fund mentioned," and required the board to "hear and decide all applications for relief or pensions under" the act, and declared that "the decision of such board on such applications shall be final and conclusive and not subject to review or reversal, except by the board." Sec. 4, Id. The last clause quoted was stricken out by sec. 2, ch. 176, Laws of 1901, which went into effect a month prior to the time when the relator was injured. Those words being stricken out, it is urged that the action of the board in denying the relator's application was not "final and conclusive," but was "subject to review or reversal" by the courts.

Conceding that to be true, still it is to be remembered that

the board only had such powers as were expressly granted by the statute or necessarily implied therefrom. *Gilman v. Milwaukee,* 61 Wis. 592, 21 N. W. 640, and cases there cited. While the act authorizes the "board of its own motion" to retire "any member of the police department" who has become fifty years of age and "served twenty-two years or more in such department" (sec. 10, Id.), yet, as indicated by the language quoted, it expressly limits the powers of the board in granting such retirement for mere disability. In such cases the board is only authorized to "retire such disabled member from service" in case he was injured "while in the performance of his duty as such policeman," *and* after being "found upon an examination by a medical officer ordered by said board to be physically or mentally permanently disabled *by reason of service in such department* so as to render necessary his retirement from service in such department." Mere permanent disability while in such service is not enough to authorize such retirement, but, in addition, such medical officer must first find that such disability was "by reason of service in such department." There is no claim that the board ever ordered such examination by a medical officer, nor that such medical officer ever found as a fact, or otherwise, that the relator's disability was "by reason of service in such department." Such an examination and finding are made, by the express language of the act, conditions precedent to the retirement of such disabled member from service by any action of the board. The same section expressly prohibits such retirement "unless the member has contracted such disability while in the active service of such department." Such provisions of the statutes were express limitations upon the powers of the board, and hence could not be waived by the board. True, the permanent disability of the relator is conceded, but that did not give the board power to proceed in disregard of the mandates of the statutes. We must hold that the facts stated

in the petition and the writ are insufficient to entitle the relator to a peremptory writ of *mandamus.*

By the Court.—The order of the superior court of Milwaukee county is reversed, and the cause is remanded with direction to grant the motion of the defendant and quash the alternative writ of *mandamus.*

MUENCH, Respondent, vs. HEINEMANN and others, Appellants.

October 2—October 20, 1903.

Evidence: Admissions by one partner: Disabling injury: Damages: Earning capacity: Profits of business: Injury to mere licensee: Defective elevator: Judgment notwithstanding verdict: Appeal.

1. In an action against partners for personal injuries caused by the falling of a pulley in an elevator in their building, evidence of statements made by one of the defendants, in the nature of admissions as to the way in which the accident was caused and the manner in which the pulley was attached to the ceiling, was admissible as against all the defendants.
2. In an action for injuries which disabled plaintiff from attending to his regular business, it was not error to permit him to state what were the customary profits of the business, as against an objection that the books were the best evidence, especially where the charge to the jury was correct and did not allow the loss of profits as an element of damage; although, had proper objection been made, the court should, perhaps, have required that proof be first made of the size and character of the business and the quality and amount of the plaintiff's services therein—all of such facts being admissible merely as tending to show plaintiff's earning capacity.
3. Where plaintiff went upon defendants' premises to transact his own private business with defendants' employees, in which defendants themselves had no interest, he was a mere licensee, even though one of the defendants had directed or permitted him to use a certain elevator; and, if there was no active negligence on defendants' part, he cannot recover for injuries sustained while using such elevator.

4. Where defendant moved in the trial court for judgment notwithstanding the verdict and it appears, on appeal, that the motion should have been granted, this court, on reversing the judgment for plaintiff, will direct the entry of judgment for the defendant. *Sheehy v. Duffy*, 89 Wis. 6, holding that the defendant cannot move for judgment notwithstanding the verdict, overruled.

Appeal from a judgment of the circuit court for Milwaukee county; Warren D. Tarrant, Circuit Judge. *Reversed.*

This is an action to recover damages for personal injuries. In August, 1900, and for some time prior thereto, the defendants, as partners, were manufacturers of hats in the city of Milwaukee, and at the time of the accident occupied a four-story building, and had occupied the same for about two weeks. In this building there are two freight elevators, which were moved by hydraulic power, and in each of them the shifting cable passed over a sheave or pulley at the top of the shaft, which sheave or pulley was attached to a hanger, which hanger was attached by screws to planks forming the ceiling of the shaft. The plaintiff was in the grocery business in Milwaukee, and also peddled milk from 5 a. m. to noon each day, and had for some time sold milk to the defendants' employees, and continued that practice after the defendants moved into the building aforesaid. He was accustomed to take his milk cans into the east freight elevator aforesaid, and go up to the fourth floor in the elevator, operating the shifting cable himself, and come down in the same way after delivering his milk. The milk was for the employees' convenience and use, solely, but the forewoman upon the fourth floor was accustomed to collect the money from the employees and hand it to the plaintiff, thus saving time. Plaintiff testifies that on August 3, 1900, he entered the building as usual to deliver milk, and that he met *Mr. Jenner,* one of the defendants' firm, who saw him using the east elevator, and directed him in the future to take the west one, as that was the passenger elevator. This statement is absolutely denied by *Jen-*

ner. On the morning of August 4, 1900, plaintiff entered the building with his milk cans as usual, took the west elevator to the fourth floor, delivered his milk, and then took the elevator down again; and, when he was part way down, the sheave, over which the shifting cable ran, fell, striking him and badly injuring him. The jury returned the following special verdict:

"(1) Was the plaintiff injured on the 4th of August, 1900, in defendants' place of business, while riding upon an elevator therein, by being struck by an iron wheel, called a 'shifting pulley,' which fell from the top of such elevator shaft? *Answer.* Yes.

"(2) Prior to August 4, 1900, had the plaintiff been expressly directed by the defendants, or one of them, to use the elevator which he was using when injured, and not to use the other elevator, when he desired to visit the various floors in defendants' building? *A.* Yes.

"(3) Was the pulley or wheel at the top of the elevator shaft, over which the shifting cable passed, fastened in an insecure and unsafe manner, so as to be likely to be pulled or to fall from its position by reason of the operation of such elevator in a proper manner, and with ordinary care and skill? *A.* Yes.

"(4) When the elevator and its machinery were turned over to the defendants, was there any obvious and patent defect in the manner in which such shifting pulley was fastened to the timbers at the top of the building, above the elevator shaft? *A.* Yes.

"(5) If you answer the fourth question 'Yes,' then had such manner of fastening existed for such a length of time that the defendants, in the exercise of reasonable diligence, knew, or ought to have known, of its existence? *A.* Yes.

"(6) If you answer question 4 'Yes,' was such manner of fastening the proximate cause of the plaintiff's injury? *A.* Yes.

"(7) Was plaintiff guilty of any want of ordinary care which contributed to produce the injury received? *A.* No.

"(8) What sum of money will compensate plaintiff for his injury? *A.* Five hundred dollars."

Plaintiff moved for judgment upon the verdict. The defendants also moved for judgment, and, if that motion should be denied, for an order changing the answers to the second, third, fourth, and fifth questions from the affirmative to the negative, and for judgment upon the verdict when so amended; and, if both motions should be denied, the defendants then moved for a new trial. All the motions of the defendants were overruled, exception taken, and judgment rendered for the plaintiff upon the verdict, from which the defendants appeal.

For the appellants there was a brief by *Joseph B. Doe,* attorney, and *Hoyt, Doe, Umbreit & Olwell,* of counsel, and oral argument by *Joseph B. Doe.*

For the respondent there was a brief by *Doerfler, McElroy & Eschweiler,* and oral argument by *F. C. Eschweiler.* To the point that plaintiff's daily visits in bringing necessaries to the defendants' employees, to the knowledge of the defendants, and the express direction to use this particular elevator, had made him more than a mere licensee on the premises, they cited *Ill. Cent. R. Co. v. Hopkins,* 200 Ill. 122, 65 N. E. 656; *Hupfer v. National D. Co.* 114 Wis. 279–285; *Barowski v. Schulz,* 112 Wis. 415; *Anderson v. Hayes,* 101 Wis. 538; *Toomey v. Sanborn,* 146 Mass. 28; *Gordon v. Cummings,* 152 Mass. 513; *Gorr v. Mittlestaedt,* 96 Wis. 296, 298.

Winslow, J. There were two exceptions taken to rulings upon evidence, which will be noticed before proceeding to the main question in the case:

Both the plaintiff and his brother testified to having had conversations with one of the defendants (*Mr. Jenner*) after the accident, and that *Mr. Jenner* stated that plaintiff was struck by the falling pulley or wheel; that it was put up carelessly, and that it was just put up on a two-inch piece of pine wood with a screw, and the screw worked through; that

it was negligent on the part of the elevator people to put it up in that way; and that it ought to have been bolted. Due objection and exception were taken to the reception of this evidence, but we are unable to see wherein there was any error. *Jenner* was one of the defendants, and a copartner with the other defendants. His statements, which were in the nature of admissions as to the way in which the accident was caused, and the manner in which the pulley was attached to the ceiling, were certainly competent, not only as against himself, but as against his copartners.

It appeared that the plaintiff had a small grocery business, which he managed afternoons, and that he peddled milk in the morning, and that he was prevented by the accident from attending to either business for about eight weeks. He was then asked the question: "What were your customary and usual profits from your business—both the milk and grocery business—for the six months prior to the accident?" To this objection was made by defendants as incompetent, with a request to be allowed to ask the witness a question to show its incompetency, which being granted, the witness was asked if he kept books in his business, and replied in the affirmative. Upon this, the objection was renewed and overruled, and the witness answered, "About $20 per week." The witness further stated that he was obliged to employ a man for eight weeks, at an expense of $10 per week, while he was laid up. No further evidence was given as to the size or character of the plaintiff's business. In charging the jury as to the eighth question of the special verdict, the trial judge said, in substance, that compensation would consist of a reasonable physician's bill, the reasonable expense of hiring an extra man, made necessary by his injury, and such sum as would reasonably compensate plaintiff for his pain and suffering resulting from the injury, and that the jury should answer the question by taking into consideration these elements. It is claimed that it was error to admit the testimony as to the

profits of the plaintiff's business. This subject has been so recently reviewed by this court in the case of *Heer v. Warren-Scharf A. P. Co.* 118 Wis. 57, 94 N. W. 789, that any extended discussion now seems out of place. In that case it was, in substance, held that where a man not working on a salary, but managing an established business, which is mainly dependent on his personal exertions, has been disabled, and sues to recover damages for the injury, it is competent to show the character and magnitude of the business, and to that end to show the capital and assistance employed in the business, also the quality and amount of the plaintiff's services in the business before the accident, and the amount of the profits of the business, not for the reason that such profits are in any respect elements of damage, nor that their loss or impairment can be proven because they represent interest on the capital employed, the value of the good will, and perhaps other elements, in addition to the value of the personal services of the plaintiff, but for the reason that all these elements, when known, are truly descriptive of the quality of the service of which the plaintiff was capable before his injury, and thus tend to throw light on his earning capacity. Of course, all of the elements above named are essential, and, in the orderly trial of a case, the proof of the amount of profits should not be made until the other necessary elements are shown. This, however, is simply a question of the order of the proof, which is largely in the discretion of the court, and it is manifest that all the elements cannot be proven in one breath; nor was any objection made upon this ground, but simply upon the ground, apparently, that the books were the best proof of the fact. Had objection been made on the ground that the preliminary facts had not been shown, or had motion been made to strike out on that ground, it may well be that the objection should have been sustained or the proof stricken out; but in the absence of such objection or motion we cannot say there was affirmative error in the ruling, es-

pecially in view of the fact that the charge of the court was entirely correct, and did not allow the consideration or recovery of loss of profits as an element of damage.

The main question in the case, however, is whether, under the facts testified to by the plaintiff himself and found by the jury, there is any liability shown; and this depends upon the question whether, under those facts, the plaintiff was a mere licensee, or one who was upon the premises by invitation, express or implied. If he was a mere licensee, there can be no recovery, because a mere licensee takes the premises as he finds them, and the licensor owes him no duty, save to refrain from acts of active negligence rendering the premises dangerous. *Cahill v. Layton,* 57 Wis. 600, 16 N. W. 1. If, on the other hand, he was more than a mere licensee, and was on the premises by invitation, express or implied, the defendants owed him the duty of exercising ordinary care to keep the premises in safe condition for use by persons themselves exercising ordinary care. *Gorr v. Mittlestaedt,* 96 Wis. 296, 71 N. W. 656.

Mere permission or license does not imply invitation. When that fact alone appears, the permitted person is a mere licensee; but when it is shown that the permitted person enters on the premises in the ordinary way to transact business with the licensor, or that the object of his visit is one in which there is mutuality of interest between licensor and licensee, then the permitted person ceases to be a mere licensee, and becomes not only a licensee, but an invited person, to whom the duty of exercising ordinary care is owing. *Hupfer v. National D. Co.* 114 Wis. 279, 90 N. W. 191. In the present case it appears without dispute that the plaintiff went upon the premises for the transaction of private business of his own with the defendants' employees, in which the defendants themselves had no interest, and up to the time, at least, when the defendant *Jenner,* as alleged and found, directed him to use the west elevator, he was a mere licensee; and the

simple question presented is whether that direction constituted an invitation, either express or implied. We have been unable to see how it can be so construed. True, it was a permission, but a mere licensee has permission. It substituted affirmative consent for mere sufferance, but simple consent is not invitation, express or implied. It was as if *Jenner* had said, "You are at liberty to use this elevator in transacting your own business with my employees." How can this be construed as invitation, express or implied? There was still no mutuality of interest in the object of the plaintiff's visits, nor any express or implied request to continue them, but only affirmative permission in place of tacit sufferance.

We are referred to the case of *Illinois Cent. R. Co. v. Hopkins,* 200 Ill. 122, 65 N. E. 656, as sustaining the idea that there was implied invitation in the present case. That case certainly carries the rule very far, and furnishes some ground for the contention made here; but the decision was placed upon the ground that mutuality of interest was shown, and hence that there was implied invitation, and we are unable to find any such element in the present case.

The result is that, in any aspect of the evidence, the plaintiff was a mere licensee upon the premises; and, no active negligence being shown, he cannot recover. We have found no other exceptions in the record which require discussion.

The question as to whether the case should be sent back for a new trial, or for the entry of a judgment in favor of the defendants, is not entirely clear. The ordinary rule in jury cases is that upon reversal for error they will be remitted to the trial court for a new trial; but where a special verdict has been rendered, and the appellant has moved in the trial court to change the answers to certain questions, and for judgment on the verdict when so changed, this court will, on reversal, send the case back with directions to enter judgment according to the motion, if it be held that the motion should have been granted. *Conroy v. C., St. P., M. & O. R. Co.* 96 Wis.

243, 70 N. W. 486; *Keller v. Schmidt,* 104 Wis. 596, 80 N. W. 935. In the present case there were motions to change the answers to questions 2 to 5, inclusive, and for judgment on the verdict when so amended; but the difficulty is that there was evidence in support of all these answers, and hence the motions were properly overruled. The defendants, before making these motions, however, had moved for judgment notwithstanding the verdict; but here we are met with the proposition broadly stated in *Sheehy v. Duffy,* 89 Wis. 6, 61 N. W. 295, and reiterated in the *Conroy Case,* that the defendant cannot move for judgment notwithstanding the verdict. This was a technical rule of the ancient practice, the reason for which is found in finespun distinctions, more fanciful than convincing. It seems to sacrifice the substance of things to mere form. The substance of the requirement is that the appellant should move for judgment after the verdict is in, so that the trial court may have an opportunity to pass on the question. To say that when he moves for judgment *on* the verdict this court will, on reversal, direct the judgment, but will refuse it when he moves for judgment *notwithstanding* the verdict, savors extremely of legal hair-splitting. In either case the trial court is moved to grant the very judgment which we now say should have been granted, and we have concluded to overrule the case of *Sheehy v. Duffy* upon this point.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment for the defendants.

THE STATE EX REL. BOARD OF EDUCATION OF THE CITY OF SUPERIOR, Appellant, vs. HUNTER, City Treasurer, Respondent.

October 2—October 20, 1903.

Taxation: Schools: Cities: Levy of school tax by county board: Statutes construed.

1. The word "town" in sec. 1074, Stats. 1898 (providing that the county board may determine "the amount to be raised by tax in each town for the support of common schools therein," etc.), should be construed, under subd. 17, sec. 4971, in the broad sense of taxing district, whether town, city, or village; and the words "town clerk" in sec. 1079 include clerks in cities and villages as well.
2. The determination by the county board, pursuant to sec. 1074, Stats. 1898, of an amount to be raised by tax in a city or other taxing district for the support of schools therein, is a levy of the tax, since the statutes (secs. 1076, 1079) leave nothing to be done thereafter to raise the amount, except the performance of purely ministerial duties.
3. Such tax, though levied by the county board, is not a tax for county purposes, to be accounted for to the county treasurer, but is a town, city, or village tax, as the case may be; and its character is not altered by a misdescription of it in the warrant for its collection or by any other mistake in treating it as levied for county purposes.
4. Sec. 554, Stats. 1898, providing that the state superintendent shall withhold that portion of the state school fund which would otherwise go to any particular subdivision of the state if such subdivision shall have failed to raise by tax a school fund "as determined by the county board in pursuance of sec. 1074," does not indicate a legislative intention that such determination of the county board should merely create a condition precedent, to be satisfied by the power to levy taxes lodged in the taxing district, but was intended to secure the actual placing of the required sum to the credit of the school board in the taxing district, authority being given to supply any deficiency by transfer from the general funds of the district.
5. Under sec. 111 of the Superior city charter (ch. 124, Laws of 1891), making it the duty of the city treasurer, after payment

of the state taxes, to set aside all sums of money levied for school purposes, no distinction is to be made between taxes levied by the board of education and the school tax levied by the county board pursuant to sec. 1074, Stats. 1898.

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

Mandamus action to compel the treasurer of the city of Superior, Douglas county, Wisconsin, to set aside, for the use of the board of education of such city, of the moneys in his hands, a certain sum on account of the county levy of taxes for school purposes for 1902.

The material facts are these: The board of education of the city of Superior, under the charter of such city, has power to annually levy the taxes necessary to raise the requisite funds for school purposes. The board exercised its power in that regard for the year 1902. The county board of supervisors subsequently levied, in form, a county school tax of $17,025.91 upon the taxable property of the city of Superior, to be placed in the tax roll of 1902 for collection. Such levy was duly certified to the city clerk of such city as a county tax, with other such taxes. It was so extended upon the tax roll of the city for 1902. The total of county taxes was $102,999.31. The warrant attached to the roll, in specifying the moneys to be paid to the county treasurer for county purposes, included therein the county school tax levy of $17,025.91. The amount of the delinquent return and the county orders taken in by the city treasurer in payment of taxes of 1902 was $107,661.78. The sum actually collected upon the county school tax levy was $14,625.25. That sum the treasurer set aside out of the total moneys collected by him for the use of the school board. The board demanded that he so set aside the balance necessary to make up a sum equal to the county school tax levy. He refused to do so, claiming that in no event could he be required to so set aside

money out of a county levy for school purposes in excess of the amount actually realized by him therefrom.

Upon a verified petition on behalf of the board of education, setting forth such facts and others not necessary to mention, an alternative writ of *mandamus* was sued out, requiring the city treasurer to do the act he had refused to perform as aforesaid, or show cause why to the contrary. He demurred to the sufficiency of the petition. The demurrer was sustained, and the relators appealed.

Geo. B. Hudnall, for the appellant.

Thos. E. Lyons, for the respondent, contended that the statute in question has no application to the city of Superior; that if it be held applicable it must be construed as authorizing the county board to prescribe a minimum limit of taxes to be raised for the support of schools; and that the tax in question not being included in the amount levied by the board of education or the common council, the same is illegal and not enforceable by the defendant treasurer.

Marshall, J. The main question submitted for decision is this: Was the $17,025.91, extended upon the tax roll as a county school tax, a legal city school tax, to be treated as other such taxes? That depends upon a construction of secs. 1074, 1076, 1079, Stats. 1898. Respondent suggests at the outset that the first section, which creates the power of the county board to levy school taxes, if any exists, applies only to towns. True, the term "town" only is used. But, viewing the entire scheme of the statutes in relation to the treatment of school taxes by county boards, it seems quite clear that such term was used in the broad sense of taxing district, whether town, city, or village, and that it should be so construed under subd. 17, sec. 4971, Stats. 1898, providing that the word "town," wherever used in the statutes, "may be construed to include all cities, wards, or districts unless such construction would be repugnant to the provisions of any act

specially relating to the same." When all the provisions of law bearing on the subject are taken together, not only does it appear that there is no repugnancy therein to such a construction, but it appears that no other construction can be adopted without sacrificing harmony. We will quote the vital part of each of such provisions:

"Each town *and city* shall be required to raise by tax, annually, for the support of common schools therein, a sum not less than one half the amount received by such town or city respectively for school purposes from the income of the school fund." Sec. 4, art. X, Const.

"Provision shall be made by law for the distribution of the income of the school fund among the several towns and cities of the state for the support of common schools therein, . . . and no appropriation shall be made from the school fund to any city or town for the year in which said city or town shall fail to raise such tax." Sec. 5, art. X, Const.

"The school fund income . . . shall be apportioned by the state superintendent between the tenth and fifteenth days of December in each year. Such apportionment shall be made among the several counties, towns, villages and cities according to the number of children in each over the age of four and under the age of twenty years, as shown by the reports made to the state superintendent for the year preceding, ending June 30. Whenever any town, village or city shall fail in any year to raise by tax, for the support of common schools therein, a sum equal to the amount of its share of such school fund and other income as determined by the county board in pursuance of section 1074, the amount of the apportionment to such town, village or city for that year shall be withheld from the next succeeding apportionment, unless," etc. Sec. 554, Stats. 1898.

"The county board shall . . . determine by resolution the amount of tax to be levied in their county for county purposes for the year, and also the amount to be raised by tax in each town for the support of common schools therein for the ensuing year, which shall not in any town be less than the amount apportioned to such town in the last apportionment of the income of the school fund," etc. Sec. 1074, Stats. 1898.

"The county clerk shall apportion the county tax . . . among the several towns, cities and such villages as aforesaid therein; . . . and shall carry out in the record book aforesaid, opposite to the name of each in separate columns, the amount of state taxes and charges and the amount of county taxes so apportioned thereto, and also the amount to be raised as aforesaid for the support of common schools therein; . . . and within ten days after the assessment of values by the county board he shall certify to the clerk of, and charge to, each town, city and such village the amount of each and all such taxes so apportioned to and levied upon the same." Sec. 1076, Stats. 1898.

"Upon the receipt of the certificate of apportionment from the county clerk said town clerk shall, upon a uniform percentage, calculate and carry out in one item opposite to each valuation in said tax roll the amount required to be raised upon such valuation to realize in his town the whole amount of state, county, school and other taxes so certified," etc. Sec. 1079, Stats. 1898.

Thus it will be seen that the constitutional plan was to impose on each subdivision of the state acting directly in the collection of taxes, whether town, city, or village, the duty to raise each year, for school purposes, an amount at least equal to the public money received from the state for such year. The word "city" is used with the same significance in the constitution as the word "town." The same is true of sec. 554, which relates to the duty of the state superintendent of schools. While the section relating to the power of the county board to order the raising of school taxes uses only the word "town," it is followed by the section covering the subject of the certification of the action of the county board to the taxing districts, using the words "town," "city," and "village," referring back, clearly, to the same taxing districts that are covered by the word "town" in sec. 1074. Sec. 1079, providing what shall be done pursuant to the county clerk's certificate mentioned in sec. 1076, says: "said town clerk shall," etc. It is obvious, however, that the reference was intended

to include every clerk to whom a certificate is required to be sent; that is, to the clerks of villages and cities as well as of towns.

It seems to follow clearly from the foregoing that the county board had authority to determine by resolution an amount, resting on its mandate alone, to be raised in the city of Superior for 1902, for the support of common schools therein for the ensuing year. The authority was, not to impose upon the city a tax for county purposes, but a tax for city purposes. If the tax were deemed to have been levied as a county tax, and to have that character, we should be compelled to hold, as in *State ex rel. School Directors v. Nelson,* 105 Wis. 111, 80 N. W. 1105, that it was without authority of law, all payments thereof mere donations, and the clerk not bound to credit to the board of education any sum of money in excess of what he received. The facts of that case were these: A sum ordered to be raised under sec. 1074 was extended upon the tax roll of the taxing district as a county school tax and was treated as a tax for county purposes, a part being collected and turned over to the county treasurer. The question raised upon such facts was whether the money so turned over was county money and properly in the custody of the county treasurer, or whether the proper custodian of the fund was the treasurer of the taxing district for the benefit of the schools therein. Deciding those propositions the court, speaking by Mr. Justice DODGE, said in substance this:

The whole transaction, strictly speaking, was void. The taxpayers, however, are not in a position to reclaim the money voluntarily paid. We may look upon it as a donation and consider which is the donee corporation. The county board had no authority to levy any school taxes for the use of the county. It had both the power and the duty to include in its resolution levying county taxes, and in the certification thereof to the town clerk, a direction to raise a certain amount of school taxes for the use of the school district corporation.

The misdescription of the item as a county school tax was a mere mistake. The act in fact done was a direction authorized by statute. The subsequent acts in relation to the tax must be deemed to have occurred in executing that direction. There was the extension upon the tax roll and collection of the amount directed for the purpose prescribed by law—the use of the school district. The mistakes which thereafter occurred, of carrying the money collected into the funds of the county, did not change the ownership thereof. Therefore, such fund remains the property of the school district and should be in the custody of the town treasurer for its use.

Certainly, that leaves very little to be said as to the nature of the tax in question. It would be a play upon words, it seems, to hold that a resolution of a county board, levying taxes upon the taxable property of a county, the taxes to be apportioned between the various taxing districts thereof, and also containing a direction, as to each such taxing district, to raise a specified sum of money for school purposes therein, the amount of the county tax to be apportioned to each district and the amount of school taxes directed to be raised therein to be certified to the clerk thereof and placed in the tax roll for collection, is not a levy of taxes as to the school tax as well as the county tax. The word "levy" does not occur in sec. 1074 as to county taxes, nor as to school taxes. The power to determine the total amount of taxes to be raised for county purposes, in connection with the ministerial duty of the clerk to apportion the same among the various taxing districts of the county upon a basis predetermined by the board, is in legal effect a direction to each such taxing district to raise by taxation for the use of the county its proportional part; yet no one would venture to say that such action does not constitute a levy of taxes. Obviously, under the statute, the county board directs the raising, in each taxing district in the county, of a specified sum for county purposes, and a further specified fund for school purposes in such district,

the legal effect in one case, as well as in the other, being to levy a tax.

The scheme of the statutes seems to be plainly as indicated. Three steps are rendered essential to charge the taxable property in a taxing district with the county school tax. They show unmistakably that the sum directed to be raised in the district by the board must, by force of its mandate, when duly evidenced to the clerk of the district, regardless of any other levy of school taxes, be spread upon the tax roll. First, the county board must "determine by resolution the amount of tax to be levied in their county for county purposes for the year, and also the amount to be raised by tax in each" taxing district "for the support of common schools therein for the ensuing year." Sec. 1074. Second, the county clerk is required to carry out in a book, opposite to the name of each taxing district in his county, "the amount of state taxes and charges and the amount of county taxes so apportioned thereto, and also the amount to be raised as aforesaid for the support of common schools therein;" and certify the same to the clerk of each such district, and to charge to such district "the amount of each and all such taxes so apportioned to and levied upon the same." Sec. 1076. Third, upon receipt by the clerk of any taxing district of the county clerk's certificate made as aforesaid, he is required to "carry out in one item opposite to each valuation in said tax roll the amount required to be raised upon such valuation to realize in his town the whole amount of state, county, school and other taxes so certified." Sec. 1079.

The law contemplates that the county board shall exercise legislative authority to levy the tax. It leaves nothing to be done thereafter to raise the amount of the levy except the performance of purely ministerial duties. The tax, as to each taxing district, though levied by the county board, is a town, city, or village tax, as the case may be, not to be ac-

counted for to the county treasurer. That is evident notwithstanding the language of sec. 1076, that the county school tax certified to any taxing district shall be charged to such district the same as county and state taxes so certified. The school tax does not concern the county at all, as it is raised in the taxing district for the benefit of the schools therein. That such is the legislative idea is evidenced by secs. 1080, 1081 and 1116. The first section requires the treasurer of the taxing district, before the time for the delivery of the tax roll to him, to give a bond to the county treasurer in double the amount of the state and county taxes apportioned to his district. It will be noted that no obligation to account to the county treasurer for school taxes ordered to be raised is recognized; that only such taxes are recognized as are required to be apportioned between the various taxing districts of the county by the county clerk. Sec. 1081 provides for the form of the warrant to be attached to the tax roll and delivered to the treasurer of the taxing district. Such form is to the effect that the treasurer of such district shall account to the county treasurer for state taxes and taxes levied for county purposes. Obviously, that does not include a school tax levied upon the taxing districts for the benefit of the schools therein. Sec. 1116 provides that the bond given by the treasurer of the taxing district to the county treasurer before receiving the tax roll, shall be discharged upon his accounting to the county treasurer for the full amount of the state taxes and the full amount of county taxes. The words "full amount of county taxes" obviously refer to the words "county taxes" in sec. 1080 which, as before indicated, excludes school taxes.

It has been suggested that sec. 554, in that it provides that the state superintendent, in apportioning the state school fund for any year, shall withhold that portion which would otherwise go to any particular subdivision of the state if such subdivision shall have failed the previous year to raise by

tax a school fund, "as determined by the county board in pursuance of sec. 1074," indicates a legislative purpose to treat the determination of the county board under such section as the mere creation of a condition precedent, to be satisfied by the power to levy taxes lodged in the taxing districts. Since the execution of the mandatory requirements of secs. 1074, 1076 and 1079, if the taxes spread upon the tax roll as to any taxing district are collected, must necessarily result in raising the taxes as to such district essential to its right to participate in the distribution of the state school fund, it seems that the purpose of sec. 554 is to enforce the performance of such mandatory duties, and to secure the actual placing of a sum of money to the credit of the school board in the taxing district equal to its proper portion of the state school fund upon the peril of such portion being withheld. It will be noted that the section deals with the necessity of having a fund actually available as a condition precedent to participation in the benefits of the state school fund, in harmony with sec. 5, art. X, Const. That is the constitutional and legislative plan as well. The condition precedent of the constitution, and of sec. 554, does not stop with the mere levy of the school tax and extension of it upon the tax roll. It includes its collection or the fund being otherwise supplied. That is made unmistakable by the language of sec. 554 to the effect that any deficiency in the tax necessary to produce the fund ordered to be raised by the county board in any taxing district for the benefit of the schools therein, may be supplied by transferring the amount of the deficit to the credit of the school fund, from the general funds of the district. Thus every taxing district is not only required to place upon its tax roll for collection a school tax designed to produce the money directed to be raised by the county board for the benefit of the schools therein, but is bound to see that the levy actually yields the whole amount thereof, either by collections or by transferring, on account of uncollected taxes, money from the

general funds of the district. That is the only way the constitutional requisite to the right to participate in the distribution of the state school fund can be fully satisfied.

The result of what we have said is that the $17,025.91, ordered by the county board of Douglas county to be raised in the city of Superior for the benefit of the schools therein for the year 1902, was legally extended upon the tax roll of such city as a city tax levied by county authority, not for the county, but for the city. The treatment of the levy in the treasurer's warrant as one for county purposes, by including it in the amount to be accounted for to the county treasurer, did not make it a county tax. Its character was fixed by the statute, not by the mistake of the city clerk in making out the warrant to the city treasurer, or any other mistake in treating the taxes as levied for county purposes. Being a levy of school taxes for the city of Superior there can be no reasonable controversy as to the right of the relator in respect thereto. Such right is plainly fixed by sec. 111 of the city charter (ch. 124, Laws of 1891), which provides that the city treasurer, each year, after payment of the state taxes for such year, "shall set aside all sums of money levied for school purposes." No distinction is there made between taxes voted by the school board and taxes directed to be raised by the county board. That supports fully the position of the relator and appellant. It was the duty of respondent, at the time of the issuance of the alternative writ of *mandamus,* to set aside, out of the money in his hands collected under his tax warrant of 1902, for the use of the school board, a sufficient sum to make, with the amount theretofore set aside, the full amount directed by the county board to be raised by the city for the benefit of the schools therein, the deficiency being $2,400.66. The order appealed from must therefore be reversed and the cause remanded with directions to overrule the demurrer and for further proceedings in accordance with this opinion.

By the Court.—So ordered.

LATHROP, Respondent, vs. CITY OF RACINE, imp., Appellant.

September 30—November 17, 1903.

Waters: Artificial channel or harbor: Riparian rights: Municipal corporations: Building of docks: Special assessments: Constitutional law: Equity: Estoppel.

1. Where an artificial navigable channel has been made by the straightening of a portion of a river constituting a harbor, the abutting owners and the public have the same rights in respect thereto as if such channel were a natural watercourse.
2. Provisions of a city charter authorizing the common council to order riparian owners to build docks along a navigable river or harbor and, if they fail to do so within the time specified, to award contracts for the work and charge the cost as a special assessment upon the property upon or in front of which the docks are built, regardless of the question of special benefits accruing thereto, are invalid as authorizing the taking of private property for public use without compensation.
3. Such charter provisions are not justified as an exercise of police power.
4. The building of such docks by the city and assessment of the cost upon the abutting property pursuant to such charter provisions being wholly without authority of law, a riparian owner who had refused, when ordered, to build the dock upon his land and had never consented to pay the cost thereof, may have the enforcement of such assessment upon his land restrained. The mere facts that he had conveyed a small portion of his land to the United States for harbor purposes, that he knew the work was in progress, and that the suit was not commenced until after the work was completed, do not estop him to question the validity of the assessment.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

This is an action to set aside and have adjudged void the special assessment proceedings and the special assessment certificate issued thereon as a lien upon the plaintiff's premises, described, and to restrain the county treasurer from selling or offering to sell such premises, or any part thereof, to satisfy such assessment. Issue being joined and trial had, the court found, as matters of fact, in effect: (1) The city is a

municipal corporation. (2) The plaintiff owned the part of block 57 described. (3) November 19, 1897, certain citizens asked the common council to cause the harbor of Root river to be widened and deepened. January 17, 1898, the committee made a favorable report, recommending assessment of damages and benefits, (4) and the same was adopted, and the city engineer was directed to make a survey and plat, which he did. (5) February 28, 1898, the common council adopted such survey and plat, and resolved to apply to the county judge for a jury to condemn and appraise the premises to be taken, April 19, 1898, and directed the city clerk to give the notice required by sec. 896, Stats. 1898. (6) Such proceedings were had that parts of blocks 57, 66, and 67, described, were condemned. (7) June 20, 1898, such proceedings were presented to the common council and referred to a committee; and September 6, 1898, the committee reported favorably, and recommended that steps be taken to provide for the payment of the lands so condemned. (8) September 6, 1898, an ordinance widening the harbor was introduced and referred to a committee, and September 19, 1898, the same was adopted. (14) November 14, 1898, an ordinance was introduced to vacate a portion of Dodge street. (15) December 5, 1898, that ordinance, which had previously been adopted, was reconsidered by the common council. (16) December 5, 1898, the common council resolved to hear persons interested in the vacation of Dodge street, December 19, 1898. (7) December 6, 1898, notice thereof was published in the papers. (18) December 19, 1898, proof of such publication was filed; and January 3, 1899, the common council adopted the ordinance mentioned in finding 14, wherein, for the first time, Dodge street was vacated. (19) No notice thereof, however, was ever given to the plaintiff. (20) No notice of *lis pendens,* or other notice, was ever filed in the register's office. (9) January 3, 1899, the common council, by resolution, directed the clerk to

notify the United States officials of their action, including a copy of such ordinance. (10) January 3, 1899, the common council resolved that the city give deeds of such lands to the United States. (11) The plaintiff gave a deed to the United States of the lands described. (13) March 20, 1899, an ordinance was adopted establishing a dock line on the north side of Racine harbor. (21) March 20, 1899, the common council resolved that the board of public works should prepare plans, specifications, and estimates of cost of docking the north line of Racine harbor, as established by the ordinance then pending before the common council. (12) March 27, 1899, the common council resolved that the city should execute deeds to the United States, and deliver the same. (22) June 5, 1899, the board of public works reported such plans, specifications, and estimates; and June 19, 1899, the harbor committee reported in favor of the adoption of the same by the common council. (23) August 7, 1899, a resolution was introduced in the common council, and was referred to the harbor committee, directing the board of public works to cause the dock to be built, as provided in the ordinance adopted July 18, 1899, and that the board of public works take charge of the work as prescribed by the city charter, and the same was adopted August 21, 1899. (24) August 7 and 8, 1899, an ordinance was adopted for the building of a dock on the north side of the Root river for the distance of 871 feet east of the east line of North Michigan street. (25) August 9, 1899, notice of such ordinance was served on the plaintiff. (26) The plaintiff refused to build such dock, and on January 20, 1900, the board of public works received four bids for the building of the same, all of which were rejected as informal. March 3, 1900, the board of public works received two bids for the work of building such dock—one from the defendant Jones for $14.48 per lineal foot for the portion to be paid for in cash, and the same price for the portion to be paid for by special assess-

ments, and the other from James Cape & Son for $200 per lineal foot for the portion to be paid for in cash, and $2 per lineal foot for the portion to be paid for by special assessments. March 6, 1900, the whole of the work was awarded to Jones, for the prices named in his bid, and thereupon a written contract was made with Jones to that effect; the work to be completed within sixty days from the commencement thereof. (27) In the fall of 1900 the board of public works issued to Jones a special assessment certificate, as follows:

"*Special assessment for building dock on north side Racine Harbor, 1900.*

"Block number 57, original plat No. 1.

"That part of block 57, original plat, bounded on the south side by Root river, on the east by Lake Michigan, on the north by a line 450 feet south of the south line of Hamilton street, on the west by North Michigan street, owned by *W. H. Lathrop,* twelve thousand six hundred fourteen and 98-100 dollars.

BOARD OF PUBLIC WORKS,
"P. H. CONNOLLY,
"PAUL OSTERGARD,
"LEO F. MILLER."

Indorsed:

"Special assessment for building dock north side of Racine harbor, 1900.

"Total special assessment, $12,614.98.

"JOHN O. JONES, Contractor."

(28) "That said assessment was for the total cost of building all of the said dock lying east of North Michigan street." (29) That said sum of $12,614.98 was placed on the tax roll of the city for 1900 as a tax against all the property of the plaintiff lying north of Dodge street and east of North Michigan street in block 57; that the plaintiff refused to pay such tax, and the same was returned delinquent; that the defendant William J. Hay, county treasurer, had advertised the same for sale for the payment of such tax, and was threatening to sell the same at the time of the commencement of this action.

And as conclusions of law the court found, in effect, that the plaintiff is entitled to the relief demanded in the complaint; that the proceedings taken by the common council to vacate a portion of Dodge street were null and void; that all that portion of Dodge street east of North Michigan street not condemned for the harbor improvement was still a public highway of the city; that all of the proceedings taken by the common council and the board of public works to require the plaintiff to build and pay for the dock in question, east of North Michigan street, and the special assessment certificate issued by the board of public works to the defendant Jones for building said dock, were and are null and void; that the plaintiff is entitled to recover his costs in this action—and ordered judgment to be entered accordingly. From the judgment so entered the city appeals.

For the appellant there was a brief by *M. E. Walker,* city attorney, and *W. H. Timlin,* of counsel, and oral argument by *Mr. Timlin.*

For the respondent there was a brief by *Palmer & Gittings,* attorneys, and *Thos. M. Kearney,* of counsel, and oral argument by *Mr. C. C. Gittings* and *Mr. Kearney.*

Cassoday, C. J. It appears that North Michigan street runs north from Root river to Hamilton street, and that Dodge street formerly ran directly east from near the south end of North Michigan street. The plaintiff's lands are located in block 57, immediately east of North Michigan street, and immediately north of what was formerly Dodge street. Block 66, mentioned, is north of Root river, and immediately west of North Michigan street; and block 67, mentioned, is immediately south of what was formerly Dodge street, and east of North Michigan street. It appears that formerly Root river ran from a point a little more than a block west of the south end of North Michigan street, in a southeasterly direction, to the lake; that several years ago it

was straightened by cutting a channel through what was then block 67, so as to run from the point mentioned almost directly east to the lake. That channel, in its narrowest place, before the change in question, was about 150 feet wide. Between the north dock line of that channel, as it then existed, and Dodge street, was a strip of land belonging to one F. M. Knapp—being a part of block 67—and running from the south end of North Michigan street east for a distance of about 600 feet. The new dock line upon the channel or harbor being so widened is located about seventy feet north of the old dock line, and extends from a point about three feet north of the middle of what was then Dodge street, at the east line of North Michigan street, easterly in a straight line for a distance of 814 feet to a point where it intersects the north line of Dodge street, and then continues a little over fifty feet further east. The deed given by the plaintiff to the United States, and mentioned in the eleventh finding of fact, only covered a very small piece of land east of such intersection of such new dock line and the north line of Dodge street, and was only appraised at $1. The deed directed to be given by the mayor and city clerk to the United States, and mentioned in the tenth finding of fact, included the portion of what was then Dodge street south of the new dock line so established. Thus it appears that the land included in the harbor so widened includes all south of the center of what was then Dodge street, and about one half of the north half of what was then that street. The part so included in the north half of Dodge street was in the form of a quadrangle, with the west end only three feet wide.

The new channel, cut several years ago, through block 67—straightening Root river—although an artificial channel, yet was navigable and must be regarded, for the purposes of this case, as giving to the abutting owners and the public the same rights and remedies that they would have had in case such channel had been a natural watercourse. *Lawson v. Mowry,*

52 Wis. 219, 9 N. W. 280; *Weatherby v. Meiklejohn,* 56 Wis. 73, 13 N. W. 697; *Mendota Club v. Anderson,* 101 Wis. 493, 78 N. W. 185; *Pewaukee v. Savoy,* 103 Wis. 277, 79 N. W. 436. It follows that prior to the proceedings in question the owner of the strip of land between such channel and Dodge street was a riparian owner on the channel, and an abutting owner on the street, whereas the plaintiff was simply an abutting owner on the street, except as to the small piece north of Dodge street at the extreme east, mentioned, which extended to the harbor. As such abutting owners, each owned the fee to the center of the street, subject, of course, to the public easement. No one will claim that the plaintiff could have been compelled to build, or pay for the building of, a dock along on the north side of what was then Dodge street, so long as the dock and shore line of the harbor remained seventy feet south of Dodge street. The claim that the plaintiff can be compelled to build, or pay for the building of, the dock in question, therefore, presupposes the rightful destruction of Dodge street, and the rightful extension of the harbor to the new dock line thus established. It is claimed on the part of the plaintiff, and the trial court held, that the proceedings to vacate the portion of Dodge street mentioned were null and void for want of jurisdiction of the subject-matter, by reason of the failure to give the requisite notice or procure the requisite determination, as required by the charter. Assuming, for the purpose of this appeal, that the proceedings to vacate the portion of the street mentioned were in accordance with the requirements of the city charter, still the question presented is whether the plaintiff could be compelled to build, or pay for the building of, a dock in accordance with the plans and specifications then on file, on the new dock line thus established, for a distance of 871 feet, at a cost of $12,614.98, as mentioned in the findings.

The proceedings for widening and deepening the harbor were at first commenced in November, 1897, under the gen-

eral statutes. For that purpose, surveys, plats, and descriptions of the lands to be taken therefor were made and reported to the common council and filed with the city clerk, and adopted as prescribed in sec. 895, Stats. 1898, as late as March 7, 1898; and the city clerk was thereupon directed to give notice of an application to be made for the selection and appointment of a jury to condemn and appraise the property to be so taken, as prescribed in sec. 896. An attempt was made to vacate a portion of the street mentioned, without notice to the parties interested, November 14, 1898, but the same was reconsidered December 5, 1898; and thereupon notice was given by publication for the vacation of the portion of the street mentioned, and the city claims that it was duly vacated January 3, 1899. The dock line was not established until March 20, 1899, and then plans, specifications, and estimates were directed to be made, and the same were made, reported, and adopted, in June, 1899. Thereupon, and in August, 1899, the board of public works were directed to build the dock as directed in the ordinance therefor, adopted July 19, 1899, and to take charge of the same as prescribed in the city charter. The general statutes under which the proceedings were at first instituted are secs. 895–904, Stats. 1898, inclusive. These sections are all contained in the chapter on "Villages," but another section of the statutes contained in the chapter entitled "General Provisions Relating to Municipalities Including Cities of Both Classes," provides:

"The board of trustees of every such village and the common council of every city may exercise all the powers conferred on village boards by secs. 895 to 904, inclusive, and proceed in the manner therein prescribed to . . . alter, widen or straighten any watercourse, or take ground . . . for the use or improvement of a harbor, as well as by the provisions of their respective charters; and the provisions of the sections aforesaid shall be taken as applicable to such villages and cities." Sec. 927, Stats. 1898.

Under these sections, it is provided that whenever the common council of any city "shall intend to . . . alter, widen or straighten watercourses therein, or take grounds for the use or improvement of a harbor, and it shall be necessary to take private property therefor, they shall cause an accurate survey and plat thereof to be made and filed with the clerk," and they may purchase or take by donation or condemnation, in the manner prescribed, such grounds as may be needed therefor. Sec. 895. In such condemnation proceedings, the jury must first find the necessity for the taking, and then the common council may enact an ordinance for "altering, widening or straightening any such watercourse, or for the use or improvement of a harbor, but shall not enter upon any such land therefor until the owner be paid in full the damages awarded him." Sec. 902. The statute then provides that:

"For the purpose of payment of the expenses, including all damages and costs incurred for the taking of private property and of making any improvement mentioned in the last preceding section, the village board [the common council of a city] may, by resolution, levy and assess the whole or any part, not less than half, of such expenses, as a tax upon such property as they shall determine is *specially benefited thereby*, making therein a list thereof in which shall be described every lot or parcel of land so assessed with the name of the owner thereof, if known, and the amount levied thereon set opposite." Sec. 903.

No levy or any tax or assessment of the whole or any part of the expenses of building such dock was ever made upon such property as the common council determined or might have determined to be "specially benefited thereby," as prescribed in that section. It is unnecessary to inquire whether the plaintiff might have been compelled to pay one half or any part of the expense of building such dock, under such general statutes, since there was no attempt to compel him to make such payment under those statutes. On the contrary, plans, specifications, and estimates of the cost of building

such dock 871 feet long were made and adopted by the common council in the summer of 1899; and on August 7, 1899, the board of public works were directed to take charge of the work and to cause the dock to be built according to such plans, specifications, and estimates "as provided by the city charter," if the plaintiff should fail to begin the building of the dock within thirty days after notice therefor. Notice was thereupon given to the plaintiff to build such dock, which he declined to do; and the board of public works thereupon proceeded to cause the dock to be built, as mentioned in the statement of facts. The precise question presented is whether, by virtue of the provisions of the city charter, the plaintiff can be compelled to pay $12,614.98, the amount of the expense of building such dock.

The provisions of the city charter relied upon are contained in secs. 65, 66, 67, 76, 77, ch. 40, Laws of 1891, and are as follows:

"Sec. 65. The common council may by ordinance or resolution order . . . the building and repair of lake shore protection, . . . the improvement and dredging of the harbor, the building, and repair of docks along Root river, and the filling of the lots adjoining such docks, the abatement of nuisances upon private property. . . . The common council ordering such work shall require the making of such improvements or doing such work in accordance with such plans, profiles, and specifications filed with the city clerk . . . and shall direct the board of public works to take charge thereof.

"Sec. 66. Every ordinance or resolution requiring the building or repair of docks, the dredging of the harbor or river and filling of lots, or the abatement of nuisances on private premises shall require the respective owners of the real estate in front of or upon which such work is to be done, to build, rebuild, or repair such docks, to dredge the harbor to a distance of fifty feet from their dock lines, or to fill such lots, or to abate such nuisances, within a reasonable time therein to be specified, but not to be less than ten days from the publication of such ordinance or resolution. The publi-

cation of such ordinance or resolution in the official paper of the city shall be a sufficient request upon such owners to perform such work or to make such improvements.

"Sec. 67. If, after the expiration of the time limited for the building or repairing of docks, filling of lots, dredging of Root river or abating any nuisance by the owners of property such work or improvement shall remain undone, the board of public works may advertise for bids and award the contract for such work, and the cost of such work done upon or in front of such real estate shall be charged and levied as a special assessment upon the several parcels of land in front of or upon which said work shall have been done, and such assessment shall be made by the board of public works and be filed with the city clerk."

"Sec. 76. All contracts for the performance of work for which special assessments are authorized, shall contain a provision that the contractor shall receive in payment the certificates of special assessments upon the particular lots or parcels of land liable to be assessed therefor," etc.

Sec. 77 provides for the issue of certificates of special assessments by the board of public works, and the mode of collecting the same, and that sales of delinquent special assessments and certificates for special assessments shall be liens upon the lots or parcels of land against which the same shall be respectively chargeable.

Counsel for the plaintiff contends that such provisions of the charter do not purport to confer any power or authority upon the common council in respect to the building of docks, nor in respect to the collecting of the cost thereof, under the circumstances of this case; that these sections, when read together, do not refer to any improvement such as is described in this record; and that they merely authorize the common council to adopt and enforce police regulations with reference to the keeping of the premises of owners abutting upon navigable streams in a safe and proper state of repair.

For the purposes of this appeal, we shall assume that the charter provisions mentioned were intended to apply, and do in terms apply, to the construction of a dock like the one in

question. We shall, moreover, assume, as counsel for the city contend, that the plaintiff is a riparian proprietor abutting on the harbor as now constructed—unincumbered by the public easement of any street. Upon such assumptions, the important question presented is whether such provisions are valid and enforceable against the plaintiff in the case at bar. The charter nowhere provides for any assessment upon such property as may be specially benefited. As we understand, counsel for the city seek to maintain the assessment against the plaintiff upon the broad ground that the city placed a valuable improvement upon the plaintiff's land; that the plaintiff knew the work was in progress, and encouraged the same by conveying to the United States the small piece of land at the extreme east end of the dock line December 22, 1898, as mentioned; and hence that the plaintiff is estopped from questioning the validity of such assessment in a court of equity. It is conceded that the plaintiff refused to build the dock, and there is no pretense that he ever promised or consented to pay the expense thereof. It is not the case of mere irregularities and failures to comply with minor statutory requirements, as in some of the cases cited by counsel, and many others which might be cited. There is a broad distinction between such irregularities and failures while proceeding under authority of law, and proceedings contrary to law or without law. *Drummond v. Eau Claire,* 85 Wis. 556, 560–564, 55 N. W. 1028, and cases there cited; *Jorgenson v. Superior,* 111 Wis. 561, 567, 568, 87 N. W. 565. The proposition urged by counsel for the city involves the surrender by the plaintiff of a strip of land along the shore of the harbor for a distance of 871 feet for a public dock, and then the right to compel him to construct thereon, or to pay the expense of such construction of, a public dock, according to the plans and specifications so prescribed by the city. Such dock is not only for the benefit of the citizens of Racine and Wis-

consin, but for the convenience of domestic and interstate and foreign commerce. If, by the charter provisions in question, the plaintiff can, regardless of special benefits, be compelled to construct such dock on his own land and at his own expense, or to pay for the expense of such construction, then constitutions are of little value. The constitution of this state declares that "the property of no person shall be taken for public use without just compensation therefor." Sec. 13, art. I. So the constitution of the United States expressly prohibits the state from depriving any person of his property without due process of law. Sec. 1, art. XIV, Amendm. It was held many years ago by the supreme court of the United States that:

"The owner of land bounded by a navigable river has certain riparian rights, whether his title extends to the middle of the stream or not. Among these are free access to the navigable part of the stream, and the right to make a landing, wharf, or pier *for his own use, or for the use of the public.* These rights are valuable and are property, and can be taken for the public good only when due compensation is made. They are to be enjoyed subject to such general rules and laws as the legislature may prescribe for the protection of the public right in the river as a navigable stream." *Yates v. Milwaukee,* 10 Wall. 497.

See, also, *Pumpelly v. Green Bay Co.* 13 Wall. 166; *Pearsall v. Eaton Co.* 74 Mich. 558, 42 N. W. 77; *Willamette Ironworks v. Oregon R. & N. Co.* 26 Oreg. 224, 37 Pac. 1016, 29 L. R. A. 88. In this last case it was held that:

"Any structure on a street which is subversive of and repugnant to its use and efficiency as a public thoroughfare is not a legitimate street use and imposes a new servitude on the rights of abutting owners for which compensation must be made. The use of a street for other than legitimate street purposes, which constitutes any impairment of or interference with the easements of an abutting owner, is a taking of his property, within the meaning of the constitution."

In the Michigan case cited, proceedings were instituted to discontinue a portion of a state road, and it was held that:

"The *benefits* to be received by a person whose land is taken by the public for a road are a part of the consideration for the release of the land, or its condemnation for that purpose, and when once vested in him, or he becomes entitled thereto, are as much his property as the land itself; and neither the state, nor any of its subordinate agencies, can deprive him of them without notice, a finding of public necessity, and compensation ascertained by a constitutional jury."

This court has held that:

"The legislature of this state may authorize municipal corporations to levy special assessments upon the adjoining lots for the improvement of highways by land or water within the municipality. Under the charter, . . . abutting property could be assessed for highway improvements *only* to the extent to which it was actually benefited;" otherwise "the assessment is invalid. Where such an assessment is invalid, equity will restrain the issue of the certificate to the contractor." *Johnson v. Milwaukee,* 40 Wis. 315, 324.

In that case, RYAN, C. J., aptly said:

"We rest our decision, not upon the rule of assessment, but upon the necessity of assessment, fairly and actually made, upon actual view of the premises to be assessed, of the benefits actually accruing to the premises by the improvement."

In a later case it was held that, where the assessment in such a case is void, the lot owner "may proceed in equity to set aside a tax sale and certificate based thereon." *Liebermann v. Milwaukee,* 89 Wis. 336, 346, 61 N. W. 1112. Mr. Justice PINNEY, speaking for the court, there said:

"We are impressed with the necessity that a strict compliance with the law on all points affecting the substantial justice of the assessment is an essential condition to a valid assessment, and that the assessment *must show upon its face* that the board has considered and passed upon all questions

made material by the statute, and the results at which they have arrived."

To the same effect, *Hayes v. Douglas Co.* 92 Wis. 429, 441, 65 N. W. 482; *Kersten v. Milwaukee,* 106 Wis. 200, 204, 81 N. W. 948, 1103.

The supreme court of the United States has recently declared the true rule applicable in a case like this as follows:

"The principle underlying special assessments upon private property to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore that the owners do not in fact pay anything in excess of what they receive by reason of such improvement. The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." *Norwood v. Baker,* 172 U. S. 269, 19 Sup. Ct. 187.

That was a case in equity, the same as this. Id., 172 U. S. 290, 19 Sup. Ct. 187. The case was considered in the later case of *French v. Barber A. P. Co.* 181 U. S. 324, 21 Sup. Ct. 625, in which the court divided, but the majority of the court, as well as the minority, reaffirm the decision in *Norwood v. Baker, supra. French v. Barber A. P. Co.* 181 U. S. 325, 344, 349, 359, 368, 369, 21 Sup. Ct. 625. The principles therein declared certainly apply to the case at bar, for here the question of special benefits was not provided for in the charter—much less, considered by the city authorities.

The suggestion that the provisions of the charter to compel riparian proprietors to construct such docks at their own expense on their own land are justified as an exercise of the police power of the state is without foundation. Certainly the dock was not essential to promote the health, peace, morals, education, or the good order of the people; nor do we

think such enforced contribution is a legitimate exercise of any of the police powers of the state.

We find no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

WINSLOW and DODGE, JJ., took no part.

WISCONSIN NATIONAL LOAN & BUILDING ASSOCIATION: CONTINENTAL INSURANCE COMPANY, Appellant, vs. WEBSTER and wife, Respondents.

October 20—November 17, 1903.

Fire insurance: Payment to mortgagee: Subrogation: Forfeiture: Waiver: Appeal: Questions of fact not passed on by trial court.

1. An insurance company, claiming that a policy had been forfeited as to the owner but admitting liability, under a mortgage clause, to the mortgagee, paid to the latter the amount of a foreclosure judgment and took an assignment thereof. An action by the owner on the policy was afterwards discontinued by stipulation, the company paying to him the balance of the face of the policy in excess of the amount paid to the mortgagee, and the owner waiving and releasing all claims under the policy. It was expressly agreed that this transaction should be without prejudice to any right of the company to enforce its right to subrogation and other rights and remedies under the mortgage clause, and should not be considered as an admission of any past or present liability to the owner under the policy. *Held*, that there had been no waiver of the forfeiture which would preclude the company from enforcing the foreclosure judgment.
2. In a proceeding by the owner in the foreclosure action to have the judgment therein canceled on the ground that it had been paid by the insurance company, the question whether there had been a forfeiture of the policy not having been passed upon as one of fact by the trial court, and the facts in respect thereto not being admitted, the cause is remanded for a trial of that question before further enforcement of the foreclosure judgment.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

In May, 1901, the plaintiff building and loan association held a mortgage upon certain real estate of the defendant *Webster,* which had been defaulted, and upon which foreclosure action had been instituted and gone to judgment on July 7, 1900. That association also held an insurance policy of the appellant *Continental Insurance Company* for $1,000, dated April 15, 1899, of Wisconsin standard form, and bearing the Wisconsin standard mortgagee clause, with provision for payment by the company to the mortgagee notwithstanding certain breaches of condition by the owner, and for subrogation of the insurance company to the rights of the mortgagee in case of any payment under that clause. On May 10, 1901, the buildings on the premises were destroyed by fire. The appellant insurance company claimed it was not liable to the defendant because the premises had been allowed to be vacant, without notice to or consent by the company, for several months prior to and including the time of the fire, and for the reason that no notice was given it of the institution of the foreclosure proceedings. Suit was commenced by defendant *Webster* against the insurance company, joining the building and loan association as plaintiff, to recover on this policy, and defense was interposed upon the grounds above stated, among others.

On October 15, 1901, the insurance company paid to the building and loan association $972.75, the total amount due upon its foreclosure judgment, and received an assignment of the foreclosure judgment, and also received a receipt acknowledging payment of said sum in full satisfaction of all claims and demands in favor of said association and against the company upon the policy, and releasing and discharging all claim in favor of the association thereon. Thereafter, on December 9th, the defendant *Webster* and the insurance company entered into a written stipulation of settlement whereby

the company paid to him $27.25, and the action against the insurance company was agreed to be discontinued and dismissed. By the stipulation *Webster* waived all claims and demands of every nature under said policy, and it was agreed that the transaction should be "without prejudice to defendant's [insurance company's] right, if any such it has, to proceed on, collect, and enforce the payment of" the judgment of foreclosure (above described) "which has come into the hands of said defendant, and generally without prejudice to defendant's indemnifying itself under, proceeding on, and enforcing its right to subrogation, transfer, and assignment, and other rights and remedies provided in the mortgage clause attached to said policy, if any; which alleged claims, if any, the plaintiff *Webster* does not recognize, and in no way herein admits or waives his defense thereto;" also that the transaction "shall not be considered as an admission or concession of any past or present liability by said defendant [insurance company] to said *Webster* under said policy." As a part of the same transaction, *Webster* gave his receipts, in the usual form, acknowledging payment of the amount "in full satisfaction, compromise, and indemnity for all claims and demands upon said company" for the loss by fire, and released and discharged the company from all further claim by reason of the loss, and canceled the policy. Judgment was thereupon entered in the suit against the insurance company on December 10, 1901, that the action "be discontinued now and forever, and that plaintiff's complaint therein be dismissed upon the merits," without costs.

On September 2, 1902, the insurance company, without being substituted as plaintiff in the foreclosure action, proceeded to make sale under the foreclosure judgment, and a stipulation was entered into that such sale might be in form made without prejudicing the rights of the parties to submit to the court all claims for or against the validity of the insurance company's demands under said judgment. Sale was made, property bought in by the insurance company for less

than the amount of the judgment, and application made for confirmation and judgment for deficiency; at which stage, in opposition to such motion, the defendant *Webster* interposed a petition alleging that the foreclosure judgment was paid in full, and demanding concellation thereof and of the sale thereunder, and return of the title of the premises to him. An affidavit was filed setting out the above-mentioned grounds of defense to any claim upon the insurance policy, and asserting the claim of the company to subrogation under the mortgagee clause by reason of its payment to the mortgagee.

The court referred certain questions of fact and the legal deductions therefrom to a referee, namely, whether the insurance company paid the building and loan association and defendant *Webster* the full amount of insurance; the amount and date of such payment to each; whether receipts were given, and whether the receipts were connected with any other stipulations; whether the judgment of foreclosure has been paid, and the facts in reference to such payment; and whether the judgment of foreclosure should be satisfied and discharged; and later modified that order by expressly withholding from such reference any question of the forfeiture of the policy by reason of alleged vacancy or otherwise. After taking considerable testimony, the referee reported that the full amount of $1,000 on the policy had been paid in the manner hereinabove recited; that thereby the judgment had been satisfied and discharged, and that the same ought to be canceled by order of court—which report was adopted by the court, and order entered that the sheriff's sale be set aside; that the *Continental Insurance Company* be made a party plaintiff to the foreclosure action, and should satisfy and discharge the foreclosure judgment. Bill of exceptions embodying the proceedings was duly settled. From that order the *Continental Insurance Company* appeals.

For the appellant there was a brief by *Nohl & Nohl,* and oral argument by *Max Nohl.*

E. M. McVicker, for the respondents.

DODGE, J. The actual decision of the trial court which resulted in the order appealed from was to the effect that the appellant insurance company, by paying the full amount of its policy, had so effectively waived all forfeitures under the terms of the policy by reason either of vacancy without consent or of commencement of foreclosure proceedings without notice to the company that it could not assert that the policy had become void. It seems almost too plain for debate that such decision ignored or neutralized the express stipulation of the parties at the time of the payment to defendants of the $27.25, which, it is true, equaled the full face of the policy, with the previous payment to the mortgagee. Clearly, no waiver of forfeitures could be predicated upon the payment to the mortgagee of the amount of its mortgage. That payment the company was required to make by virtue of the mortgagee clause, whether the policy had become void or not. It is in evidence that it was made for that reason, and to facilitate the subrogation provided for in that clause—perhaps unnecessarily—an express and formal assignment of the foreclosure judgment was made to the insurance company. These facts exclude any inference that the insurance company intended to waive any forfeitures in making that payment. So, when the appellant and respondents met to settle their litigation, no waiver had taken place, and appellant's right by subrogation to enforce the foreclosure judgment was clear and complete, if the policy was void for either of the reasons now assigned. Whether the payment of the balance of the policy to the defendants in silence and with no reservation of pre-existing rights might have proved or constituted a waiver, need not be decided. The parties, in the most explicit terms, by their stipulation agreed that it should have no such effect. This left them in the same relative situation that they were before that payment was made. The appellant had a right to enforce the foreclosure judgment if the amount paid to the mortgagee was, by reason of

forfeiture, not payable to the defendants upon the policy, and defendants had the right to insist that no forfeiture had taken place.

Clearly, then, the court erred in deciding as matter of law, without hearing the facts, that the policy was not forfeited; and the question presents itself whether, upon this record, it should be held that the forfeiture is established, so that an order ought to have been entered sustaining appellant's rights to foreclosure sale and deficiency judgment, or whether the question of fact on which the forfeiture is predicated should still be tried. It is, of course, obvious that that question has not been tried by the referee or by the court. The only thing in the record bearing thereon is the affidavit asserting that fact which was presented in answer to the defendants' affidavit stating why the appellant's application for confirmation should not be granted, and also as a basis for the respondents' alternative motion to cancel the judgment. No counter affidavit was filed denying those facts, and yet the parties and the court evidently considered that an issue was raised, and that the facts stated in that affidavit were not admitted. Appellant contended that they ought to be submitted to the referee in common with other facts, and the only reason urged here for not doing so was their immateriality by reason of the waiver which the court predicated upon the payment of the money. In this attitude we conclude that it would be unsafe for us to assume that the facts of vacancy without consent by the insurance company and of absence of notice to it of the foreclosure proceedings were admitted. *Hill v. Am. Surety Co.* 107 Wis. 19, 28, 34, 81 N. W. 1024, 82 N. W. 691; *Brown v. Griswold,* 109 Wis. 275, 85 N. W. 363. That question therefore should be passed upon as one of fact by the trial court, either upon existing evidence or such other proofs as the court may receive; and, if such forfeiture be established, the appellant's motion for confirmation of foreclosure

sale and entry of judgment for the ascertained deficiency should be granted.

By the Court.—Order appealed from is reversed, and cause remanded for further proceedings in accordance with law and this opinion.

MEIER, Respondent, vs. BELL, imp., Appellant.

October 20—November 17, 1903.

Reformation of instruments: Mistake: Degree of proof: Notes and mortgages taken in wife's name.

1. **In an action to reform, on the ground of mistake, notes and mortgages running to plaintiff's deceased wife, and to have plaintiff declared the owner thereof, the evidence is *held* not to establish the mistake beyond reasonable controversy and hence not to entitle plaintiff to relief.**
2. **Where, for debts owing to himself, a husband knowingly takes notes and mortgages in his wife's name, the title thereto vests in her, under sec. 2077, Stats. 1898.**

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Action by *Johann Meier* against *Sophie Bell* and others to reform certain notes and mortgages, and for judgment declaring him to be the owner thereof. One note and mortgage was executed by Frank Banholzer and wife, and was for $1,700, and the other, for $900, was executed by Martin Orlikowski and wife.

On August 21, 1865, the respondent, *Johann Meier,* purchased a farm of ten acres near the city of Milwaukee. On December 27th of the same year he conveyed to his wife, Dorothea, an undivided one-half interest therein. They held title in this manner while they lived on the farm, and until

they sold it in 1887. When they moved onto the farm, neither was possessed of any other estate than this land. The land was used for ordinary farming purposes, they jointly working it. The wife helped by milking, planting, sowing, hoeing, harvesting, and getting the produce to market. There were no children as the fruit of this marriage. Mrs. Meier had one daughter by a former marriage—the appellant *Sophie Bell.* At the time of the sale of the farm they received $1,000 in cash, and a purchase-money mortgage, taken in their joint names, for $3,000. It appears that *Mr. Meier* had other money at this time. They repeatedly spoke of holding the property in a way to keep it out of the probate court, and so that the survivor would have what remained. The money was deposited in the bank in the name of the husband because the bank refused to receive it in the names of both. When the mortgage was paid, the larger part of the proceeds were invested in a home; the deed running to them both as husband and wife, and to the surviving one of them. That home has never been sold.

In 1898 Frank Banholzer negotiated with plaintiff for a loan of $1,700, to be secured by a mortgage upon real estate. The loan was agreed upon between the parties. Plaintiff was unable to read or write. There was some discussion as to how the note and mortgage should be drawn, and whose name should appear therein. Plaintiff desired to have the instrument so drawn that, in the event of the death of himself or wife, the survivor need take no proceedings in probate court to administer the estate. He directed Banholzer to have his wife's name appear in the mortgage. Banholzer had the note and mortgage drawn in the wife's name only, and delivered them to plaintiff upon receipt of the money. Plaintiff left the mortgage for record at the register's office, and directed that it be sent to the house. It was kept there up to the time of Mrs. Meier's death. Plaintiff testified that he believed the money would come to him, as the survivor; that he knew

his wife's name was in the mortgage and note; that he and his wife had repeatedly spoken of this and the Orlikowski loan; that they discussed the fact of the instruments being in her name, and intended to have them changed or assigned, but that her health did not permit her to leave the house and have it done; that he directed Banholzer to have the Orlikowski mortgage and note drawn the same as his (Banholzer's). The Orlikowski note and mortgage were in the name of Mrs. Meier, and the interest was collected by Banholzer, and receipted for by him as her agent. The plaintiff received it from Banholzer.

Aside from these facts, plaintiff testifies to facts and circumstances tending to show that he gave different instructions to Banholzer as to how the instruments were to be drawn, and as to his knowledge of the fact that they were drawn in Mrs. Meier's name.

Dorothea Meier died intestate May 29, 1901, and the defendant Charles Friedrich in December of that year was duly appointed administrator of her estate. The defendant *Sophie Bell,* as heir of her mother, Mrs. Meier, and her husband, John F. Bell, claim that the notes and mortgages in question were the separate estate of Dorothea Meier. Plaintiff denies this, and claims them as his property, and brought this action to establish this right and for the reformation of the instruments. The court found him to be the owner of the notes and mortgages, and decreed the reformation prayed for. From that judgment this appeal is taken.

For the appellant there was a brief by *Lenicheck, Fairchild & Boesel,* and oral argument by *F. T. Boesel.*

For the respondent there was a brief by *Fiebing & Killilea,* and oral argument by *O. J. Fiebing.*

SIEBECKER, J. The findings of the trial court to the effect that the respondent was the absolute and sole owner of the amounts due on these notes and mortgages, and that they were

made and executed by mistake in the name of Mrs. Meier, are challenged by appellant upon the ground that the proof wholly fails to establish these facts. The amount and the weight of the evidence required, in equity, to obtain reformation of a written instrument on the ground of mistake, has been repeatedly considered by this court, and the rule announced as applicable to such cases must be strictly adhered to. In *Kent v. Lasley,* 24 Wis. 654, it is held:

"If the proofs are doubtful and unsatisfactory, and the mistake is not entirely plain, equity will withhold relief, upon the ground that the written paper ought to be treated as a full and correct expression of the intent until the contrary is established beyond reasonable controversy."

See, also, *Kropp v. Kropp,* 97 Wis. 137, 72 N. W. 381.

An examination of the evidence constrains us to hold that the proof is not so clear, convincing, and entirely plain as to establish beyond reasonable controversy that the notes and mortgages were made and executed by mistake in the name of respondent's wife. The evidence relied on for this purpose is mainly that of respondent and the witness Banholzer. Respondent's testimony pertaining to the transactions is contradictory in many of its statements, and vacillating upon a number of material and important questions, which renders it unsatisfactory in its probative force, leaving an uncertainty upon the main issues in the case. His memory seemed confused, and he was unable to detail the facts and circumstances surrounding this transaction in a clear and convincing manner. The testimony of Banholzer, one of the mortgagors, and he who attended to the making of the notes and mortgages under respondent's direction, fails to corroborate respondent in material and important respects. Nor are the corroborating circumstances sufficient to remove the inherent uncertainty of the proof. It seems that respondent treated the farm and the money realized therefrom as if Mrs. Meier had an interest therein. He apparently understood that the

notes and mortgages were drawn in her name. He made no claim that a mistake had been made, either to her or in her presence, when the subject arose in conversation, nor to Banholzer or the other mortgagor. He first claimed that a mistake was made in drawing the notes and mortgages after Mrs. Meier's death, when her heir asserted title thereto. These facts and circumstances, in connection with the conflicts and uncertainty in the proofs, leave the evidence upon the issuable facts obscure and uncertain, and thus fail to establish so plain and clear a case for equitable relief as to remove it beyond reasonable controversy.

It is argued that, if no equitable relief can be awarded upon the ground of mistake, the plaintiff should recover upon the ground that the debt is due him, although he took the notes and mortgages in the name of Dorothea Meier. This assumes that he knowingly took the notes and mortgages in his wife's name. Under such circumstances, sec. 2077, Stats. 1898, applies, and precludes him from recovering the debt as his. Under this statute, the title of the property vested in Dorothea Meier, as alienee in the mortgage. *Skinner v. James,* 69 Wis. 605, 35 N. W. 37; *Gallagher v. Gallagher,* 89 Wis. 461, 61 N. W. 1104; *McElroy v. Minnesota P. H. Co.* 109 Wis. 116, 85 N. W. 119.

Upon the grounds stated, we are forced to the conclusion that plaintiff has failed to establish any ground for relief, and that the court erred in awarding judgment in his favor.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment dismissing the complaint.

KUENER and another, Appellants, vs. PROHL, Administrator, Respondent.

October 20—November 17, 1903.

Wills: Construction: When debts and legacies a charge on homestead.

1. **A provision in a will, "After my just debts and funeral expenses have been paid, I give," etc., does not, under sec. 3862, Stats. 1898, make such debts a charge upon testator's homestead therein devised.**
2. **A will gave testator's household goods and $1,000 to one of his two sons, and directed that the rest of his property, real and personal, be divided equally between them. *Held*, that such legacy of $1,000 was a charge upon all the testator's estate, including, if necessary, his homestead, and that a mortgage given by the other son on his interest in the homestead covered only one half of the proceeds thereof remaining after payment of said legacy.**

APPEALS from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Charles Prohl, Sr., died December 9, 1895, leaving a last will executed July 24, 1895, which was duly admitted to probate, and contained this provision:

"After my just debts and funeral expenses have been paid I give and bequeath unto my beloved son, *Charles J. Prohl,* all my household, consisting of beds, carpets, crockery, tables and everything known and classed as household goods, and the sum of $1,000, and the rest of my real and personal property shall be divided amongst my two beloved sons, Albert C. Prohl and *Charles J. Prohl,* share and share alike."

The testator left, him surviving, no widow or minor child, but only his two sons thus named in the will. At the time of his death the testator was possessed of some personal property, consisting of household furniture, and a claim against his son Albert C. for $1,000, and also two separate pieces of

real estate, situated in Milwaukee. One of these pieces was situated in the Sixth ward, and was subject to a mortgage executed by the testator after the execution of his will, which was foreclosed after his death, and the land was sold for barely enough to satisfy the mortgage thereon. The other piece of land was situated in the Thirteenth ward, and constituted the homestead of the testator, and was subject to a mortgage executed by the testator after the execution of his will, which was also foreclosed after his death, and the land was sold for enough to satisfy the mortgage thereon, and leaving a surplus of $1,375.68, after paying the expenses thereof.

About five months prior to the death of the testator he became an accommodation guarantor on a note to the appellant *Kuener* for $4,500, which became due July 2, 1896. After the principal who executed that note had failed to pay, and *Kuener* had exhausted the other collateral security, *Kuener* filed such claim against the estate of the testator, and the same was allowed to an amount in excess of such surplus; and *Kuener* insists that such claim should be paid out of such surplus, and is a charge thereon. The county court held that such surplus was exempt from the payment of *Kuener's* claim, and rendered judgment accordingly, which, on appeal, was affirmed by the circuit court, from which last judgment he appeals to this court.

After the death of the testator, and on August 8, 1896, the son Albert C. gave a note of $1,500 to the appellant *Emily Heyn,* and executed and delivered to her a mortgage to secure the same, on all his right, title, and interest in such homestead; and no part of that note and mortgage has been paid. Shortly prior to the testator's death, Albert C. made an assignment for the benefit of his creditors, and the testator's claim against him for $1,000 was proved up against his estate; but no dividend has been paid thereon, and the same

was regarded by both courts as of no value. The county court adjudged that, under the provisions of the will quoted, the son *Charles J.* was entitled to receive out of such surplus the legacy of $1,000 to him, with interest thereon from December 6, 1896, and that only the balance of such surplus was to be divided equally between him and the appellant *Heyn,* as the mortgagee of the son Albert C.; and that judgment was affirmed by the circuit court, from which *Emily Heyn* appeals to this court.

For the appellants there was a brief by *Nath. Pereles & Sons,* and oral argument by *C. F. Hunter.* They contended, *inter alia,* that a clause devising property after the payment of the testator's debts, charges his realty, or his property which is devised or bequeathed, with the payment of such debts. *Alexander v. M'Murry,* 8 Watts, 504; *Tuohy v. Martin,* 2 MacArthur, 572; *Gardner v. Gardner,* 3 Mason, 178, 208–212; *McLellan v. Turner,* 15 Me. 436; *Sanborn v. Clough,* 64 N. H. 315; *Power v. Davis,* 3 MacArthur, 153, 164–167; *Lafferty v. People's S. Bank,* 76 Mich. 35, 45; *White v. Kane,* 1 How. Pr. (N. S.) 382; *Smith v. Coup,* 6 Dem. 45; *Matter of Hesdra,* 2 Connoly, 514; *Matter of Fox's Will,* 52 N. Y. 530; *Shreve v. Shreve,* 2 C. E. Green, 487; *Fenwick v. Chapman,* 9 Pet. 461; *Reynolds v. Reynolds' Ex'rs,* 16 N. Y. 258. Instances of words which are words of general direction merely, and which do not amount to a charge, are found in numerous cases and are well instanced by those where a testator directs that his just debts be paid by his executors, or be paid out of his estate, or where he merely directs that his debts be paid. *Matter of Bingham,* 127 N. Y. 296; *Matter of Powers,* 124 N. Y. 361; *Clift v. Moses,* 116 N. Y. 144; *Brookhart v. Small,* 7 Watts & S. 229; *Gaw v. Huffman,* 12 Grat. 628; *Harmon v. Smith,* 38 Fed. 482; *White v. Kauffman,* 66 Md. 89; *Balls v. Dampman,* 69 Md. 390; *Brands v. Hartung,* 38 N. J. Eq. 42. See,

especially, *Will of Root,* 81 Wis. 263; *Turner v. Scheiber,* 89 Wis. 1; *In re Madden's Will,* 104 Wis. 61, 65; 2 Woerner, Adm. 989, 1097; Underhill, Wills, § 397.

For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas,* and oral argument by *F. C. Winkler.* To the point that the language of the will did not show a specific intent to charge any property with the payment of debts, they cited *Matter of Rochester,* 110 N. Y. 159; *Matter of O'Brien,* 39 App. Div. 321; *Cunningham v. Parker,* 146 N. Y. 29; *Balls v. Dampman,* 69 Md. 390.

CASSODAY, C. J. 1. It is contended on the part of the administrator *de bonis non* that *Kuener's* claim is based upon the mere accommodation guaranty of the testator to answer for the debt of another, and hence is not a debt, within the meaning of the clause of the will quoted. For the purposes of this appeal, we shall assume that it was a debt. The important question presented is whether it became a charge upon the homestead, or, in other words, upon the surplus arising upon the foreclosure sale of the homestead. The statute provides that:

"When the owner of any homestead shall die not having lawfully devised the same, such homestead shall descend free of all judgments and claims against such deceased owner, or his estate, except mortgages," etc. Sec. 2271, Stats. 1898.

The statute also "excepts the homestead of the deceased" from "the payment of his debts," but provides that "if a testator shall make provision by his will . . . for the payment of his debts . . . they shall be paid accordingly," but that "no general direction in any will to pay the debts of the testator out of his property shall subject the homestead to the payment thereof." Sec. 3862, Id. The will in question does not attempt to make the debts of the testator a charge upon his homestead. It simply declares, in effect, that, after his debts and funeral expenses have been paid, the

personal property therein mentioned and the sum of $1,000 shall be given to the son *Charles J.*, and the rest of his real and personal estate should be divided between his two sons, share and share alike. In the late case of *Pym v. Pym,* 118 Wis. 662, 96 N. W. 429, the devise to the wife was "subject to the payment of debts, funeral expenses, and bequests," but it was held that so much of the homestead as did not exceed one quarter of an acre was exempt from liability to creditors. This was on the ground that such language was a mere "general direction," within the meaning of the statute quoted. Counsel for the appellant insists that the claim of *Kuener* is a charge upon the homestead, within the ruling of this court in *Madden's Will,* 104 Wis. 61, 65, 80 N. W. 100. In that case the testator gave and devised to his wife all his real and personal property, "to have and to hold the same during her life and at her death the said property to be" divided as follows: "One half of the real estate" to Phillip Madden, "without incumbrance;" then a legacy of $100 to a person named, and another legacy of $5 to another person named, and "the rest and residue *after all debts are paid* to Mary Ann Brown." The homestead, which was incumbered, constituted substantially all the property of the testator. The county court authorized the sale of Mary Ann Brown's interest to pay claims, but refused to allow the same for the expenses of administration, and such adjudication was affirmed by the circuit court. This court held that Mary Ann Brown's interest was also chargeable with the expense of administration. The particular statute upon which this case turns was not referred to in the opinion in that case. Obviously the decision in that case is not an authority for holding that *Kuener's* claim was a charge upon the homestead in question. Both courts properly held that it was not such charge.

2. The only claim to such surplus by the appellant *Emily Heyn* is under and by virtue of the mortgage given to her by the son Albert C. upon all his right, title, and interest in the

homestead, and hence she has no greater right to such surplus than Albert C. would have had if no such mortgage had been given. By the express terms of the will, the residue of the estate was only to be divided between the two sons, share and share alike, after the household goods and the $1,000 therein mentioned had been paid to the son *Charles J.* It will be observed that there is nothing in the clause of the statute last quoted to prevent legacies from being made a charge upon the homestead by a "general direction" in a will, as that clause of the statute only relates to the payment of debts of the testator. Both courts so held, and we perceive no reason for disturbing the judgment.

By the Court.—The judgment of the circuit court is affirmed on both appeals.

LENTZ, Respondent, vs. EIMERMANN, imp., Appellant.

October 20—November 17, 1903.

Mechanics' liens: Knowledge and consent of landowner: Evidence: Waiver by acceptance of order for amount due: Claim: Amendment: Notice to owner: Service of copy: Taxation of costs.

1. Testimony of defendant that she knew, soon after the excavation was begun, that a house was being built by her husband on a lot owned by her, and that shortly thereafter she executed a mortgage thereon and turned the money over to her husband to use in building the house, sufficiently proves her knowledge and consent, so that, under sec. 3314, Stats. 1898, a lien for materials furnished and used in the building might attach to the land.
2. Under sec. 3317, Stats. 1898, the lien of a subcontractor was not waived or discharged by his taking an order for the amount due him, drawn by the principal contractor upon the person building the house, even though the latter accepted the order conditionally and made partial payments thereon, where such order was not expressly received as payment.

3. Under sec. 3320, Stats. 1898, the court may permit the claim for a lien to be amended at the trial so as to show with whom the original contract was made.
4. "Notice in writing" of a subcontractor's claim for a lien may properly be given to the owner, under sec. 3315, Stats. 1898, by service upon him of a *copy* of the notice.
5. The taxing officer cannot refuse to tax costs for findings drawn under the direction of the trial judge, on the ground that they are voluminous.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *A. J. Eimermann,* attorney, and *John H. Paul,* of counsel, and oral argument by *Mr. Eimermann.*

For the respondent there was a brief by *Wheeler & Perry,* and oral argument by *C. B. Perry.*

WINSLOW, J. This is an action brought by a subcontractor to foreclose a mechanic's lien for materials furnished to the principal contractor, and used in the construction of a house on appellant's lot in the city of Milwaukee. The contract with the principal contractor for the erection of the house was made by one A. J. Eimermann, the appellant's husband, in his own name. There was no dispute as to the ownership of the property, the construction of the building, the furnishing of the material by the respondent, nor as to the amount unpaid. Findings and judgment in favor of the respondent were entered, and the appellant alleges a number of errors, which will be briefly considered.

1. The appellant did not make the contract for the erection of the building herself, nor was it shown that she authorized it to be made; hence there could be no lien upon the premises unless she had knowledge of the erection of the building, and consented thereto. Sec. 3314, Stats. 1898. The trial court found that she had such knowledge and gave such con-

sent, and this finding is attacked as error. The evidence of the appellant herself was that she knew a building was being constructed on the lot by her husband soon after the excavation was begun, and that she executed a mortgage thereon for $2,500 shortly thereafter, and turned over the money to her husband to use in building the house. These facts certainly are sufficient to prove knowledge and consent.

2. The principal contractor before the completion of the contract gave the plaintiff an order on A. J. Eimermann to pay the plaintiff $283.90 and charge the same on the building account. This was accepted by Eimermann conditionally upon the performance of the principal contractor's contract, and Eimermann afterwards paid $200 to the plaintiff thereon, but did not pay the remaining $83.90; being the balance due the plaintiff, and for which this action is brought. The court found that the order was not accepted as payment by the plaintiff, and the appellant claims error in this finding. Examination of the evidence shows that this finding is entirely correct. There was no substantial evidence which even tended to show that the order was expressly received as payment, and in such case the lien is not waived. Sec. 3317, Stats. 1898; *Allis v. Meadow S. D. Co.* 67 Wis. 16, 29 N. W. 543, 30 N. W. 300.

3. The claim for lien, as originally filed, did not show with whom the original contract was made; and, when the same was offered in evidence upon the trial, it was objected to as insufficient on this ground. Thereupon the plaintiff moved to amend the same by inserting the proper allegation, which motion was granted, and the appellant assigns this ruling as error. Our statute (sec. 3320, Stats. 1898) provides that a claim for a lien "may be amended in case of action brought by order of the court as pleadings may be." There can be no doubt that the amendment was properly made.

4. An objection is made to the proof of service of the contractor's notice, under sec. 3315, Stats. 1898, because the evi-

dence shows that a copy was served, and not the original. The objection is untenable. The statute simply provides that the claimant shall "give notice in writing to the owner." A written copy is certainly notice in writing.

5. Lastly it is claimed that the costs taxed were excessive, because the findings and judgment contained much unnecessary matter. The findings were certainly very voluminous, but they were presumably drawn under the direction of the trial judge, and we can see no ground on which the taxing officer could refuse to tax for them.

By the Court.—Judgment affirmed.

FORRESTAL, Administratrix, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

October 20—November 17, 1903.

Street railways: Killing of child at street crossing: Negligence of motorman: Court and jury.

1. It is the duty of the motorman of an electric car, as it approaches a street crossing, to observe children near the track in such an attitude as to suggest the probability of their placing themselves in the way of the car, and to use all reasonable care to avoid injuring them.
2. Plaintiff's intestate, a little girl about seven years old, after waiting south of defendant's street railway tracks for a car to pass going east on the southern track, attempted to cross the tracks and was struck and killed by a west-bound car on the northern track. The evidence tended to show that, had the motorman of the west-bound car performed his duty to observe the appearances at the crossing as he approached it, he would have seen the little girl before his view of her was cut off by the east-bound car, and that her movements, situation, and attitude would reasonably have suggested that she was unconscious of the near approach of the west-bound car and that she purposed crossing the tracks as soon as the east-bound car had passed her. *Held*, that it was a question for the jury whether the motorman was negligent in making no preparation to avoid running over the child when she should come upon the northern track from behind the east-bound car.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Action to recover damages alleged to have been caused to the heirs at law of Genevieve Forrestal, deceased, by the act of defendant in negligently causing her death. The claim set forth in the complaint is that the Forrestal girl, an infant of the age of six years and eleven months, while lawfully upon the crossing of Sixteenth and State streets in the city of Milwaukee, a public thoroughfare therein, engaged in crossing State street, was, through negligence of the motorman in charge of one of defendant's cars operated on such street, struck by the car and fatally injured. The alleged negligence of the motorman is failure to give the deceased proper warning of the approach of his car, running it at an unlawful rate of speed, failure to keep it under proper control, failure to see the child in time to avoid injuring her, and failure to properly use the fender device on the car when it was apparent that the car could not be stopped before reaching the child. In addition to the foregoing the complaint contained proper allegations as to formal matters and all conditions precedent to the maintenance of the action.

The answer put in issue the allegations of negligence, and those as to the damages suffered by the heirs at law of the deceased.

The evidence produced upon the trial was to the following effect: State street in the city of Milwaukee is about sixty-four feet wide. It runs east and west and is crossed by Sixteenth street, which is about sixty feet wide. Upon State street, at the time of the accident, defendant operated an electric street car system, using two parallel tracks, the north one being for cars going west and the south one for cars going east. At the intersection of the two streets the child was struck and fatally injured by a car going west, at about 9 o'clock in the evening of May 21, 1902. The crossing and said streets were artificially lighted, so that the motorman

on the west-bound car from two to three hundred feet east of the crossing could have seen a child of the character of the one injured approaching his track from the south side of State street and on the west side of the crossing. Such opportunity for observation continued as the car approached Sixteenth street and up to the point where the child was struck, except as hereafter stated. The car track at the time of the accident was wet and slippery. The circumstances of the injury were as follows: As one of defendant's cars going east upon the south track at a speed of about ten miles per hour was approaching Sixteenth street, and the one that did the mischief was approaching such street from the opposite direction on the north track at about the same rate of speed, the situation of the cars being such as to plainly indicate that they would pass each other on the crossing, the deceased, accompanied by her brother, a child of about five years of age, approached the south track on the west side of the crossing. They were walking hand in hand, and somewhat faster than a walk, going on a hop and skip, as one of the witnesses testified. Between the curb on the south side of the street and the south track, and a safe distance therefrom, they stopped, apparently seeing the car approaching from the west, and waiting for it to pass. At that time they could have been seen by the motorman on the west-bound car. About as the car passed them it intercepted the line of vision of the motorman on the west-bound car. As soon as the east-bound car passed the children they proceeded toward the north track hand in hand as before, hopping and skipping in a childish manner. They emerged from behind the east-bound car and stepped almost immediately upon the track in front of the west-bound car, so that it was impossible for the motorman thereon to prevent the accident. He did not see the girl and could not have seen her from the time his line of vision was interfered with as aforesaid till she appeared so near the track that he could not, at the speed his car was going, stop it

before reaching the point where the injury occurred. As the car approached the crossing the motorman shut off the current and took up the slack of his brake, and also sounded the gong on his car, following the rules prescribed by the company in such situations. As soon as he observed the child on the track he reversed the current and set his brakes, but was so near the girl that the motion of the car was not materially slackened before striking her. There was evidence tending to show that under ordinary conditions such a car could be stopped in going about sixty feet. There was no evidence as to the speed a car should be going under the circumstances of the accident in order that the motorman might stop it in case of a child suddenly appearing upon the track in front of it, in time to prevent injuring the child.

At the close of the evidence the trial court, on motion, directed a verdict in favor of the defendant, holding that the evidence was insufficient to show want of ordinary care upon the part of the motorman who had charge of the car. Judgment was rendered accordingly.

For the appellant there was a brief by *Hoyt & Olwell,* attorneys, and *Hoyt, Doe, Umbreit & Olwell,* of counsel, and oral argument by *L. A. Olwell.*

For the respondent there was a brief by *Spooner & Rosecrantz,* and oral argument by *Clarke M. Rosecrantz.*

MARSHALL, J. The legal principles applicable to the foregoing statement are too familiar to warrant taking time or space to state them. It goes without saying that it is the duty of a motorman in charge of an electric street car to keep a careful lookout ahead upon and in the vicinity of his track so far as the performance of his other duties will reasonably permit, to the end that he may avoid injuring any person that may accidentally or otherwise place himself in a dangerous situation in the pathway of such car; that the degree of diligence in that regard, in order to come up to the

standard of ordinary care which the law requires, varies with time, place, amount, and character of travel upon the street, opportunity for the motorman to see persons using the street for ordinary travel as they approach the track and for such persons to see the approaching car, and all circumstances naturally calculated to increase the hazard of injuring such persons. The care thus indicated, in law, charges the motorman with the duty to use ordinary care to avoid dangerous consequences from causes within his knowledge, and from those which he might, by the exercise of proper vigilance, have knowledge of as well. He is bound not only to keep the careful lookout indicated, but to observe persons approaching the track, or so circumstanced as to suggest a reasonable probability of such approach unconscious of danger, whom, consistent with proper attention to his general duties, he might observe, and to handle his car, so far as ordinary care will permit under all the circumstances, so as not to injure them. Obviously, those principles require a motorman at a street crossing to exercise greater care than between crossings, and much more care in case of very young children approaching the track unconscious of an approaching car, or being so circumstanced as to suggest a probability of such approach, than in case of adults. The citation of decided cases in respect thereto, as regards the case before us, would not be of any great benefit. None can be found, we venture to say, characterized by all the material elements present in this case. For that reason we shall content ourselves with a brief reference to principles, omitting entirely the citation of cases. That class of cases where, in each, a child playing near the track at some point other than at a street crossing suddenly ran in front of a car; and that where, in each; a child standing by the track at a safe distance therefrom looking at an approaching car, and notwithstanding his attitude did not suggest a purpose to go upon the track, he suddenly did that, and so near the car that the exercise of ordinary care on the

part of the motorman after opportunity existed to see the child in a situation of danger did not enable such motorman to avoid injuring the child; and the class in each of which the child, at some point between crossings, suddenly emerged from behind another car or a team, or some object, interfering with the motorman's seeing him until the dangerous situation was created; and that where in each the motorman observed a child at a crossing approaching the track, watching the car and apparently intending to avoid getting in its way, but who suddenly ran in front of it; and others that might be mentioned, where it was held that the motorman was free from actionable negligence, neither rule nor throw any light upon the controversy in this case. To refer to and discuss them would be more liable to confuse than to solve the question raised by the appeal.

There can be no doubt that it was the duty of the motorman, as his car approached the crossing, to observe children near the track in such an attitude as to suggest a probability of their placing themselves in the way of the car, and to use all reasonable care to avoid injuring them in the event of that probability changing to a certainty. It is no excuse for him, as we have seen, that he did not see the little girl as she was waiting for the east-bound car to pass. The evidence tends to show that he had a good opportunity to see her so circumstanced, apparently unconscious of the approach of his car, when he was not more than about 100 feet from the east side of the street crossing, and 160 feet from her, and when it was his duty to take a view of the crossing, so far as he reasonably could, and to see whatever was observable by the exercise of ordinary attention to his duties, calling, or which might probably call, for action on his part in respect to controlling the movements of his car. If a jury should find, as they might properly from the evidence, that had the motorman performed his duty to observe the appearances at the crossing as he approached it, he would have seen the little

girl in the attitude of waiting for the east-bound car to pass her, apparently unconscious of the approach of the west-bound car, and suggesting the probability of her attempting to cross the street as soon as the east-bound car passed her, and when she could not see the west-bound car nor the motorman see her till too close upon her to avoid running her down unless during the time she was obscured from his view by the east-bound car he prepared to avoid such danger, could they reasonably find therefrom the further fact that it was a breach of the motorman's duty as regards the safety of the child to operate his car regardless thereof? Assuming, as we must, that a jury might properly find the primary facts mentioned, was the trial court warranted in holding as a matter of law that the motorman was not guilty of any actionable fault? It seems that an affirmative answer is clearly due to the first proposition and a negative answer to the second, and that the trial court was clearly wrong in taking the case from the jury. Evidently such court did not give due significance to the fact that the motorman ought to have seen the little girl as she was in the attitude of waiting for the east-bound car to pass her before his line of vision was cut off by said car; nor due significance to the fact that her movements, situation, and attitude reasonably suggested a probability of unconsciousness of the near approach of the west-bound car, and that she purposed proceeding across the tracks as soon as the east-bound car passed her. The circumstance present in many cases where the motorman was held free from fault, of a child, suddenly and without any reasonable ground to expect it on the part of the motorman, emerging from obscurity and rushing into danger, did not exist here. Here, while the child suddenly emerged from behind the east-bound car and ran immediately in front of the car that injured her, a jury would be warranted in saying, as we have indicated, that the motorman had good ground to expect that very event. If he had such ground, his failure to make any provision to

avoid the dangerous consequences which might otherwise be likely to occur might well be found by a jury to be inconsistent with the exercise of ordinary care upon which the law would pronounce judgment of actionable negligence.

The judgment must be reversed and the cause remanded for a new trial.

By the Court.—So ordered.

ELLISON and others, Respondents, vs. STRAW and another, imp., Appellants: NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Garnishee, Respondent.

October 20—November 17, 1903.

(1-3, 6) *Life insurance: Surplus accumulations, when a debt to assured: Garnishment: Exemption in favor of married woman.* (4) *Appeal: Findings: Presumptions.* (5) *Notice of issue on garnishee's answer: Renewal as to substituted answer.*

1. Where a life insurance policy dated September 19, 1885, provided for payment of the accumulated surplus upon the completion of a tontine period of fifteen years, said period expired with the close of the 18th day of September, 1900.
2. Where the accumulated surplus upon a life insurance policy is payable to the assured, at his option, upon the completion of a tontine period, without the consent of any other person named as beneficiary, and is not payable at all in the event of the death of the assured before the completion of said period, the liability to pay such surplus, when such liability arises, is a debt owing to the assured, and the subject of garnishment as such.

[3. Whether the exercise of the option of the assured, in accordance with the policy, to have such accumulation paid to him in cash, is such a condition precedent to absolute liability to him that garnishment would not lie in its absence, not determined.]

4. In support of a finding of the trial court that said accumulation had become payable absolutely, it will be assumed, in the absence of any exception to such finding and of any bill of

exceptions containing the evidence, that the assured took all steps legally necessary to make the liability absolute.

5. Notice of issue on the answer of a garnishee need not be renewed after the service of a substituted answer setting up, in the main, the same facts.

6. Although the wife of the assured is named as the beneficiary in a life insurance policy, the accumulated surplus thereon, which is payable absolutely to the assured at the expiration of a tontine period if he survives that period and the policy is then in force, is not exempt from the claims of his creditors under sec. 2347, Stats. 1898.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

Action of garnishment. Summons served on *Northwestern Mutual Life Insurance Company,* as garnishee, September 19, 1900. Answer by garnishee, and issue thereon, and trial. Defendant *Alonzo W. Straw* insured his life in the garnishee company on September 19, 1885, $15,000, by policy payable to his wife, *Amelia E. Straw.* The policy was so-called semi-tontine, whereby it was agreed that the tontine period should be fifteen years; that during that period no dividends should be payable; that on the expiration of the tontine period there should be payable a sum representing the profits of the policy from year to year during that period, and in addition the so-called tontine gains resulting from the division amongst policies of that class of earnings distributable to other policies which should lapse in the interval. The policy provided that such sum should be payable to "the said insured or his assigns, without the consent of any other person named within as beneficiary," in the manner following, at insured's option: First, in cash; second, by way of annuity in payment of thereafter recurring premiums upon the same policy; third, in the purchase of a new full-paid policy; fourth, in cash, in connection with the surrender value of the rest of the policy; and, fifth, in connection with the surrender value of the rest of the policy, in the purchase of a new paid-up policy; but, if no notice of election were given by the assured within sixty

days, then the sum was to be applied in the second manner above described, namely, as an annuity fund out of which to pay premiums.

The court found that on the 19th day of September, 1900, the garnishee was indebted to *Alonzo W. Straw* for such tontine dividends in the sum of $3,802.47, presently and absolutely due; that at that time *Alonzo Straw* was largely indebted in excess of any property and was insolvent. Judgment was accordingly rendered against the garnishee for that sum, which it paid into court, and which by a subsequent order was directed to be paid over to the plaintiffs unless the defendants took an appeal from the judgment, accompanied by a *supersedeas* undertaking, within the time limited. This they did not do, and the money has been accordingly paid over to the plaintiffs. This appeal is taken from judgment against the garnishee. No bill of exceptions has been settled.

For the appellants there were briefs by *Turner, Pease & Turner* and *James H. Stover,* and oral argument by *W. J. Turner.*

William Kaumheimer, for the respondents *Ellison.*

Charles E. Dyer, for the garnishee respondent.

Dodge, J. The appellants' assault upon the judgment is predicated upon two propositions: First, that there was no debt due from the garnishee to *A. W. Straw* at the time of the service of the garnishee summons, to wit, September 19, 1900; secondly, that any such debt was exempt from seizure for debts of either *Mr.* or *Mrs. Straw.*

1. The first proposition is that the so-called tontine dividend accumulation had not become due absolutely on the 19th day of September, for the asserted reason that the tontine period was not completed until that day had passed; hence, if *Straw* had died on that day, the dividend accumulation would never have become payable. With this contention we cannot at all agree. The policy did not provide that this

payment should be made upon condition that *Mr. Straw* should be alive and the policy in force for fifteen years *after* the day of its date, September 19, 1885. It did provide that "the tontine period shall be fifteen years," and that upon the completion of the tontine period these accumulations should be paid to the assured in the manner described in the statement of facts. There can be no question that the day on which the policy was written was a part of this tontine period. The policy was then in force and operative as fully as ever afterwards. Hence one year of the tontine period expired with the termination of the 18th day of the following September, and correspondingly the fifteen years expired with the close of the 18th day of September, 1900. To hold that it included the 19th day of September of that year would obviously require the policy to be in force for fifteen years and one day. We can entertain no doubt that the time when this payment might have been demanded had been reached on the 19th day of September, 1900, when the garnishee summons was served.

Next it is insisted that the liability of the company for these tontine dividend accumulations is not a debt to *Alonzo W. Straw*. The only support for this contention is apparently that it arises out of one of the provisions of the policy of insurance, in which *Mrs. Amelia E. Straw* is named as beneficiary. But she is named merely as beneficiary of the life insurance. The provision for payment of the tontine dividend accumulations is that:

"Upon completion of the tontine dividend period, . . . the said insured or his assigns, without the consent of any other person named within as beneficiary, if any, shall have the option either: *First*, to withdraw in cash the accumulated surplus apportioned by the company to this policy," etc.

We cannot feel justified in attempting to state at length reasons for so obvious a conclusion as that this agreement is one wholly with the assured, and over which he has full

control. That sum was not payable at all in the event of his death before the expiration of the tontine period. It therefore was nothing in the nature of life insurance, but, on the contrary, was most clearly an agreement to pay to him a computable sum upon certain contingencies. The fact that it is contained in an instrument which also promises and agrees to pay to *Mrs. Straw* a certain sum upon his death in no wise tends to vary this result. *Miller v. Campbell,* 140 N. Y. 457, 462, 35 N. E. 651; *Tennes v. N. W. Mut. L. Ins. Co.* 26 Minn. 271, 3 N. W. 346.

But again it is insisted that no absolute debt existed to the defendant *Alonzo W. Straw* unless it was shown that he had exercised his election that the accumulation be paid to him in money, instead of being applied by the insurance company either to provide an annuity for future premiums on this policy, as it was agreed that it should be if he exercised no election within sixty days, or to the purchase of other forms of insurance. We shall not deem it necessary to decide whether the exercise of *Straw's* election so constituted a condition precedent to the absolute liability to him that garnishment would not lie in its absence. It suffices for the determination of this contention by the appellants that the trial court has affirmatively found that at the time of the service of the garnishee summons the accumulation had become payable absolutely. In support of this finding of fact, it must be assumed that any steps legally necessary to its correctness were established by the evidence. Appellants have seen fit to come here without exception to the findings, and without a bill of exceptions to inform us of the proofs. It is not impossible that there may have been definite proof of the exercise by *A. W. Straw* of the election vested in him by the policy, and of the making of a demand for this sum. If such facts were not established, and were necessary to the ultimate fact found by the court, appellants should have re-

served exception to that finding and brought the evidence up on this appeal.

In this connection it is urged that both the original answer of the garnishee and a substituted answer interposed four months later, in pursuance of a stipulation that such later answer might be substituted for the original one, declare that no election or demand had been made by *A. W. Straw.* To the original answer the plaintiffs responded by a formal statutory notice of issue, but served none such after the service of the substituted answer. Of course, the service of the notice of issue raised an issue on all facts asserted in the garnishee's answer, and evidence might have been offered on either side thereof, but in the absence of any such notice of issue the garnishee's answer is to be taken as true. It is claimed that, because such notice was not renewed after the service of the substituted answer, its allegations must be accorded conclusive effect. It has many times been held in this court that, when a complaint is amended after an answer thereto has been filed, that answer will stand as the answer to the amended complaint, unless it be withdrawn or a new one be filed. *Yates v. French,* 25 Wis. 661; *First Nat. Bank v. Prescott,* 27 Wis. 616; *Harris v. Wicks,* 28 Wis. 198; *Knipe v. Stefan,* 50 Wis. 286, 289, 6 N. W. 877. No reason is apparent why the same rule should not apply to the situation here. Plaintiffs, having once notified the garnishee of their desire that the facts set forth in the garnishee's answer be made subject of proof, may well be deemed to have intended to stand upon that notice, although a new answer came in, in this case stipulated to be a mere substitution, which set forth in the main the same facts with some slight modifications. It is, of course, apparent from the record, even without a bill of exceptions, that the court and the parties both took this view upon the trial and assumed that issues of fact arose upon the garnishee's answer to be tried. Other-

wise no findings of fact would have been either necessary or proper. Besides, those findings declare in express terms that a trial was had. We cannot avoid the conclusion that this record makes plain that issues of fact existed upon which evidence might have been given and justified a finding either way, according to the evidence.

2. Claim of exemption from debts, whether of *Mr.* or *Mrs. Straw,* is predicated upon sec. 2347, Stats. 1898, the general purpose of which legislation was thoroughly treated in *Ellison v. Straw,* 116 Wis. 207. In compliance with the views there expressed, that statute must doubtless be given liberal construction for the protection, especially, of widows, in their right to receive insurance upon the life of a husband or other person. On the other hand, the inference is equally obvious of a legislative intent not to screen the husband in building up for himself a fund beyond the reach of his creditors. Life insurance is one thing, investment is another, but the ingenuity of the life insurance companies in formulating contracts which confuse the distinction has been active for generations. Pure life insurance has become rare, except with beneficial associations; but the gradations from that contract, with some slight provision for accumulation of dividends, to contracts where the accumulation is the predominant, if not even the exclusive, purpose, are almost numberless. Life insurance is a promise to pay a certain sum upon the death of the assured. *Tennes v. N. W. Mut. L. Ins. Co.* 26 Minn. 271, 3 N. W. 346; *Talcott v. Field,* 34 Neb. 611, 52 N. W. 400; *Shakman v. U. S. Credit System Co.* 92 Wis. 366, 66 N. W. 528. Doubtless the amount so payable may be augmented by accumulation of excessive premiums and their earnings in the hands of the company without destroying the essential character of the contract. When, however, we find, as frequently, a promise to repay a sum made up from a portion of the premiums and their earnings at a date certain in the lifetime of the assured, we have only a contract

such as a savings bank may as well make. *Uhlman v. New York L. Ins. Co.* 109 N. Y. 421, 430, 17 N. E. 363. Whether such a fund, if payable to a married woman, is life insurance, within the terms of sec. 2347, and exempt from debts of either the husband or wife, in absence of intent to defraud creditors, we need not decide, nor perhaps question, in this case. See *Talcott v. Field, supra; Studebaker Bros. Mfg. Co. v. Welch,* 51 Neb. 228, 70 N. W. 920. We have already shown and declared that the particular provision now under consideration is in no wise for the benefit of *Mrs. Straw.* The fund is by the terms of the policy as absolutely the property of and payable to *A. W. Straw* as would be an accumulation in a savings bank or building and loan association. It is not "made payable to a married woman," or to any trustee for her, within the terms of sec. 2347, and therefore is not protected by the further provision that insurance so payable shall be free from the claims of creditors.

We conclude that the record discloses no error of the trial court in adjudging liability upon the garnishee.

By the Court.—Judgment affirmed.

MARSHALL and SIEBECKER, JJ., took no part.

BURNHAM, Respondent, vs. BURNHAM and others, Appellants.

October 21—November 17, 1903.

Deeds: Setting aside for fraud: Degree of proof: Drunkenness: Capacity to contract: Attorney and client: Conspiracy: Settlement between husband and wife: Ratification: Waiver.

1. **A deed or contract should not be set aside for a fraud in fact unless such fraud is proven by clear and satisfactory evidence.**
2. **A person addicted to the habitual and excessive use of intoxicating liquor is not incompetent to contract and convey property**

unless his reason is dethroned by actual intoxication or his understanding so impaired as to render him mentally unsound when the act is performed.

3. A finding of the trial court that attorneys who were acting for plaintiff's wife in negotiating a settlement with him had represented to him that they were acting as his attorneys in the matter, and that he relied upon them to protect his interests and legal rights, and a further finding that they had conspired with the wife to cheat and defraud plaintiff of his property, are *held* to be contrary to a clear preponderance of the evidence.

4. It appearing that plaintiff expressed his approval of a settlement with his wife whereby he conveyed to her a half interest in his real property; that during three or four months thereafter he fully understood the terms of the settlement and treated the matter as satisfactorily arranged and concluded; and that, after taking counsel as to his right to have the agreement and deed set aside for fraud, he nevertheless insisted upon having a mortgage of the property executed by himself and his wife, pursuant to the terms of the settlement, for the purpose of paying his debts, it is *held* that he thereby ratified the settlement and waived any right to revoke or annul it.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN K. PARISH, Judge. *Reversed.*

The appeal is by defendants from a judgment annulling a deed of conveyance made by plaintiff, *Clinton Burnham,* to his wife, *Anna Burnham,* and canceling a mortgage on the property described in the deed, given by *Anna Burnham* to D. G. Rogers and *Charles D. Mann.*

On and before February 6, 1901, the plaintiff, *Clinton Burnham,* was the owner of an estate of considerable value in the city of Milwaukee. He had always lived there, and had established a household there for himself and defendant *Anna Burnham,* his wife, immediately after their marriage in 1894. They lived together except when family differences and difficulties separated them for a time, and until reconciliations were affected and their differences adjusted and marital relations were resumed. In the month of January, while living separated, the defendant *Anna M. Burnham*

took steps to secure a settlement with plaintiff of their matters of difference, and, in the event of failure, to press her claims to obtain a divorce and a share of his estate. For this purpose she employed the firm of Rogers & Mann as her attorneys, and through them she secured an agreement with plaintiff on February 6, 1901, whereby it was agreed, in effect, that all causes of action existing between them be mutually settled; that they resume the marital relations which had for some time theretofore been suspended; that plaintiff, by deed, convey to her an undivided one-half interest in all his real estate, excepting the foundry property; and that they mutually execute such deeds and mortgages on this real estate necessarily required to pay and settle plaintiff's indebtedness, not to exceed, however, the sum of $46,000. The agreement contained further stipulations in no way material to this controversy. This agreement was carried out by an immediate execution of a deed conveying an undivided interest in this real estate to her, their resumption of their marital relations, and the beginning of negotiations for a mortgage loan to cover the indebtedness specified, which negotiations were continued to May 21, 1901, when plaintiff and his wife executed a mortgage on this real estate to secure a loan for the plaintiff of the sum of $46,000, to be applied in payment of his debts, as agreed between the parties.

This action was commenced on the 27th day of May, 1901, to cancel and declare null the contract and deed above referred to, between plaintiff and his wife, and the mortgage given to Rogers & Mann to secure the amount due them for services rendered in these transactions and this litigation, upon the grounds that plaintiff's mind and memory were impaired to the extent that he was incapable of fully comprehending and transacting ordinary business affairs, and that the defendants wickedly conspired and colluded together to cheat and defraud plaintiff, and did, through false and fraudulent means, deprive him of his property for their benefit.

These charges the defendants severally deny, and allege that these negotiations were carried on and this settlement was made openly and honestly, in good faith, with the purpose and intent to deal justly and lawfully between plaintiff and his wife, *Anna M. Burnham,* in seeking to adjust and settle the matters in dispute between them.

The trial court found, in substance, that the proof sustained the allegations of the complaint, and awarded judgment setting aside the contract of settlement, and annulling the deed whereby he conveyed to her an undivided one-half interest in the real estate described therein, and the mortgage given by her to Rogers & Mann. From this judgment, the defendants appeal.

For the appellants there was a brief by *W. J. Turner,* of counsel, and *Rogers & Mann,* attorneys; a supplemental brief by *Miller, Noyes & Miller,* of counsel for appellants *Mann* and the estate of D. G. Rogers; and oral argument by *Mr. Turner* and *Mr. George P. Miller.*

For the respondent there was a brief by *Fiebing & Killilea,* and oral argument by *H. J. Killilea.*

SIEBECKER, J. This action is brought to set aside a certain contract and deed which it is alleged defendants procured from plaintiff by fraud, when he was incapable of comprehending and transacting his business, on account of mental impairment induced by the excessive use of intoxicating liquors. Many errors are assigned upon the ground that the findings of fact by the trial court are not supported by the evidence. This is a case wherein relief is sought for a fraud in fact, which it is alleged infected the transaction and rendered it voidable in law. In such cases the fraud must be proven by clear and satisfactory evidence.

"Solemnly executed instruments are not to be set aside or reformed except on evidence sufficient to establish mistake

or fraud so clearly as to leave no substantial doubt." *Baumann v. Lupinski,* 108 Wis. 451, 84 N. W. 836; *Lavassar v. Washburne,* 50 Wis. 200, 6 N. W. 516, and cases cited; *Fillingham v. Nichols,* 108 Wis. 49, 84 N. W. 15.

After a careful examination and scrutiny of the evidence, we come to the several inquiries presented on this appeal:

1. Did the court err in finding that the plaintiff had been so excessively addicted to the use of intoxicating liquors that his mind and memory were impaired to an extent which made him unable to fully comprehend his business affairs? Much evidence was adduced upon this inquiry by both parties. It is shown that plaintiff had been addicted to the excessive use of intoxicating liquors for a number of years before the contract and deed in question were executed, and that such excesses had produced attacks of sickness of body and mind, incapacitating him at such times from transacting business. The evidence also shows that, when not sick and free from intoxication, he possessed his mental faculties and understood, comprehended, and attended to his business affairs. At such times his conduct pertaining to his personal and business affairs was characterized by intelligence, understanding, and common sense, and he assumed to manage his business without the aid of others or reliance on their judgment. The evidence tends to show that plaintiff was actually intoxicated at the first interview between the parties, which occurred several days prior to February 6th, the date of the contract and deed. All negotiations were postponed, and resumed a few days thereafter, when plaintiff appeared perfectly natural and free from intoxication. His testimony indicates that he fully understood the nature, import, and importance of the settlement with his wife, and that he remembered the details thereof with considerable accuracy. We are persuaded that the evidence clearly establishes that plaintiff was free from intoxication when the settlement was negoti-

ated and the deed was executed and delivered; that he fully understood the nature and import of the transaction, and was competent to make a contract.

A person addicted to the habitual and excessive use of intoxicating liquor is not incompetent to enter into contracts and convey property, unless it appears that actual intoxication dethroned his reason, or that his understanding was so impaired as to render him mentally unsound when the act was performed. *Johnson v. Harmon,* 94 U. S. 371; *Van Wyck v. Brasher,* 81 N. Y. 260; *Reinskopf v. Rogge,* 37 Ind. 207.

2. Error is also assigned upon the finding of the trial court that defendants Rogers & Mann fraudulently represented to plaintiff that they were acting as his attorneys in negotiating this settlement, and that he relied upon them to protect his interests and legal rights. In support of this finding, it is argued that Mr. Rogers is shown by the evidence to have been the attorney and counselor of members of the Burnham family for many years; that he settled the father's estate; that the firm of Rogers & Mann had for years been attorneys for plaintiff in various matters, and was so employed at the time of these negotiations. True, they had been attorneys for him at various times, and as such represented him on different occasions. The proof, however, discloses nothing which tends to show they were generally retained as his attorneys for his legal business. The evidence on this subject shows that whenever he desired their services he specifically employed them. It is without dispute that they were not employed by him as attorneys in litigation with his wife at former times, and that he had at various times employed other counsel to attend to legal matters for him. In a letter written to him on January 19, 1901, he was informed by them that they had been retained by *Mrs. Burnham* to secure a possible settlement with him, and, if not successful, that she would commence action. We cannot perceive how plaint-

iff, under such circumstances, could be deceived or misled on the subject of their acting as attorneys for *Mrs. Burnham.* The evidence fails to show that Rogers & Mann were plaintiff's attorneys in any matter pending at the time of the settlement. It is insisted, however, that Mr. Rogers led him to believe that they would protect his legal rights and interests, and that he relied thereon. The specific proof relied on to support this contention is the evidence of plaintiff that Mr. Rogers so stated to him, and an inference from a statement said to have been made by Mr. Rogers to plaintiff's brothers while negotiations were progressing. This is denied by Mr. Rogers and by *Mrs. Burnham* and *Mr. Mann,* who were present at the interview. It also appears that the negotiations were conducted by *Mr. Mann* in his separate office, and that plaintiff suggested and insisted that certain terms and conditions for his protection and interest be inserted as stipulations of the settlement, before he assented to execute the written instruments. After the settlement he asserted that he fully understood its terms, and that it complied with his intention and understanding in settling all controversies between himself and wife. In the light of all these facts and circumstances, plaintiff must be held to have exercised a reasonable amount of intelligence and judgment. His claim that he was misled by Mr. Rogers to rely upon him as his attorney is clearly without foundation. The evidence fails to furnish any reasonable basis for holding that any deception or undue influence was used to deceive or mislead him.

3. Further error is assigned upon the finding that the defendants entered into a conspiracy to cheat and defraud plaintiff of his property. Having found that plaintiff fully comprehended and was capable of transacting his business affairs, and that the evidence fails to show that he was misled into the belief that Messrs. Rogers & Mann were acting as his attorneys in the matter, and that he was informed that they were acting as the attorneys of *Mrs. Burnham,* no

grounds remain for asserting that she and her attorneys had conspired to cheat and defraud him out of his property.

4. Defendants contend that the court erred in refusing to find, as requested by them, that plaintiff had ratified the agreement and deed. It is not seriously contested but that plaintiff, by acts, conduct, and declaration, expressed his approval of the settlement between February 6 and May 21, 1901, the day when he and *Mrs. Burnham* executed the mortgage to secure a loan of $46,000, under the settlement, to pay his debts. It appears that he had taken counsel pertaining to the very question litigated upon this trial some time before this mortgage was executed, yet he insisted on having the mortgage made under the agreement, and it was so made. It appears that during the months of February, March, April, and May he fully understood the terms of this settlement, and that he treated the matter as satisfactorily arranged and concluded. Had the agreement been infected with any legal wrong, these acts would have purged it, and he would be deemed to have adopted and reaffirmed the settlement as originally made. A party to a contract, complaining that he was induced to make it through the wrong of another, cannot assert its invalidity, and at the same time insist that it be carried out and performed. Under such circumstances, insistence on performance is an affirmance and adoption of the agreement, and a waiver of any right to revoke and annul it. Story's Eq. § 1551; *Grymes v. Sanders,* 93 U. S. 55, 23 L. Ed. 798; *Conrow v. Little,* 115 N. Y. 387; *Pence v. Langdon,* 99 U. S. 578; *Moller v. Tuska,* 87 N. Y. 166.

We must hold that the findings of the trial court upon the main issues above specified are contrary to the clear preponderance of the evidence, and therefore erroneous.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment dismissing the complaint; the judgment in this court to that effect to be entered as of the time the cause was submitted, to wit, October 21, 1903.

CITIZENS LOAN & TRUST COMPANY, Administrator, Appellant, vs. WITTE and others, imp., Respondents.

October 21—November 17, 1903.

Mortgages: Foreclosure: Liability for deficiency: New judgment after reversal: Premature sale.

After the reversal of that part of a foreclosure judgment which adjudged that certain defendants were not personally liable for any deficiency, the judgment was completed in the trial court pursuant to the mandate of the appellate court, and contained an order for judgment against said defendants for any deficiency on the sale, they being adjudged personally liable therefor. *Held* that, under sec. 3162, Stats. 1898, as against those defendants there could be no sale until the expiration of a year after such completion of the judgment.

APPEAL from an order of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Nath. Pereles & Sons,* and oral argument by *C. F. Hunter.*

For the respondents there was a brief by *Fiebing & Killilea,* and oral argument by *H. J. Killilea.*

CASSODAY, C. J. This case was here upon a former appeal from that part of a judgment of foreclosure and sale of the mortgaged premises rendered January 9, 1902, which adjudged that the defendants *Otto* and *Katherine Witte* were not personally liable for the whole or any portion of any deficiency that might arise upon the sale of the mortgaged premises, by virtue of the deed to them of the premises executed January 16, 1894, wherein they assumed, as a part of the purchase money, and thereby agreed to pay, the notes secured by the mortgage. *Citizens L. & T. Co. v. Witte,* 116 Wis. 60, 63–66, 92 N. W. 443. This court reversed that judgment, and held that *Otto* and *Katherine Witte* were personally liable for such deficiency, and remanded the cause to the

trial court, with direction to complete the entry of judgment in accordance with the opinion filed therein. Thereupon the *remittitur* was filed in the trial court, and on January 24, 1903, such judgment was so completed, and it was therein adjudged, among other things, that *Otto* and *Katherine Witte,* and two others therein named, were personally liable for the amount of such deficiency and interest from the date of sale, and that the plaintiff have execution therefor to enforce the payment of the same. June 1, 1903, the mortgaged premises were sold by the sheriff on the foreclosure judgment so perfected to the defendant *Thomas J. Pereles* for $2,500; and the sheriff thereupon executed, acknowledged, and delivered to such purchaser a deed of the premises, and made and filed his report of such sale with the clerk of the court June 11, 1903. Thereupon the plaintiff gave notice of application to the court for an order confirming such report of sale, and for an order directing judgment for deficiency against the defendants *Otto* and *Katherine Witte* for the sum of $1,854.52. Upon the hearing of such motion the defendants *Otto* and *Katherine Witte* appeared by counsel and objected to such confirmation on the ground that they were entitled to one year from January 24, 1903, to redeem the mortgaged premises, and hence that the sale was premature and ought not to be confirmed, and moved the court, upon the records, to set aside the sheriff's report of sale. Thereupon the court entered an order denying the application to confirm the report of sale, and setting aside and vacating the same. From that order the plaintiff appeals.

The statute provides, in effect, that the judgment of foreclosure and sale shall fix the amount of the mortgage debt, as therein prescribed, "and shall adjudge that the mortgaged premises be sold for the payment of the amount adjudged" therein, "and when demanded in the complaint," as here, "an order directing that judgment be rendered for any deficiency against the parties personally liable therefor; but

no such sale shall be made until the expiration of one year from the date of such judgment or order of sale," etc. Sec. 3162, Stats. 1898. The manifest purpose of the last clause quoted was to give all parties interested one year from the date of the judgment or order of sale within which to redeem from such judgment. And so another section of the statute declares that:

"The mortgagor, his heirs, personal representatives or assigns, may redeem the mortgaged premises from the effect of said judgment and the lien of the mortgage thereon at any time before the sale of such premises by paying to the clerk of the court in which the judgment was rendered, or to the plaintiff therein, or any assignee thereof, or to his attorney the amount of such judgment, interest thereon as aforesaid and costs," etc. Sec. 3165, Stats. 1898.

The title to the premises, subject to the mortgage, passed from the mortgagors, through mesne conveyances, to the defendants *Otto* and *Katherine Witte;* and hence they, as such assignees, had the right to redeem. *Wylie v. Welch,* 51 Wis. 351, 8 N. W. 207. So long as the original judgment of foreclosure and sale exonerated them from any liability to pay any deficiency, they may not have cared to redeem, or whether the mortgaged premises, on sheriff's sale, brought much or little. But when, on January 24, 1903, they were adjudged liable for the payment of such deficiency, then it was for their interest either to redeem from the judgment, or see to it that the premises at the sheriff's sale should bring as large an amount as possible. This court has held that the part of the judgment "which orders a judgment for a deficiency is an integral part of the judgment." *Kane v. Williams,* 99 Wis. 65, 74 N. W. 570. The judgment so entered January 24, 1903, was a new judgment, and the only judgment against *Otto* and *Katherine Witte,* and hence the sale was premature as to them. The case is distinguished from *Bostwick v. Van Vleck,* 106 Wis. 387, 389, 82 N. W. 302, where by an amendment a mere clerical mistake in the entry of the judgment

actually rendered was corrected so as to conform to the truth. We are clearly of the opinion that the sheriff's sale was premature, and hence properly set aside.

By the Court.—The order of the circuit court is affirmed.

KOERTS, Respondent, vs. GRAND LODGE OF WISCONSIN OF THE ORDER OF HERMANN'S SONS, Appellant.

October 21—November 17, 1903.

Life insurance: Benefit societies: Who are "survivors" of member: Fraud.

1. The code of a mutual benefit society stated that the purpose of its mortuary fund was that a certain sum be paid therefrom to the "survivors" of a member after his death, and provided that if the "survivors" of a deceased member should not possess a death benefit certificate the money should be paid only to one who should produce an order from the proper court, and that if the "survivors" should produce a certificate they should, on receiving the money, sign the receipt printed on the back of such certificate. *Held*, that the word "survivors" did not include one who was neither a relative of the deceased member, nor a member of his household, nor connected with him by marriage.
2. Where the issuance of a death benefit certificate was procured by false representations by the member that the beneficiary named was one of the class for whose benefit the mortuary fund was established, and the fraud was not discovered until after the member's death, such beneficiary, whose right rests upon the certificate alone, cannot recover thereon.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

This is a controversy over a mutual benefit certificate of insurance. The controversy was submitted to the court without action on an agreed statement of facts. The material facts appearing from this statement are as follows:

Prior to July 29, 1888, the appellant was a society organized under sec. 2002, R. S. 1878, having a charter theretofore granted to it by the National Grand Lodge of the Order of Hermann's Sons. On the last-named date it organized a mutual benefit fund for its members, called a "mortuary fund," and adopted a code for the government of said fund, providing, among other things, as follows:

"(1) The purpose of the mortuary fund shall consist in this: That out of it there shall be paid to the *survivors* of a member of the Order of Hermann's Sons of Wisconsin entitled thereto, who secures to himself a right thereto by making the required payments, the sum of $1,000.00 after his death. . . .

"(3) Every one who at the time these provisions shall become operative shall be a member of the Order of Hermann's Sons in good standing shall be a part owner of the mortuary fund and shall continue to be such so long as he pays his assessments according to the laws; or so long as he shall not signify his voluntary withdrawal from the order. Every newly accepted candidate becomes such part owner of the mortuary fund by his being accepted in the order.

"(4) A part owner of the mortuary fund who shall not have paid his assessments when the lawful time therefor shall have expired is to be regarded forthwith stricken from said part ownership, but shall have the right within thirty days to regain his part ownership upon paying the unpaid assessments with an addition thereto of twenty per cent. If he shall allow such period to expire he will lose his part ownership and cannot again be admitted to such part ownership until after the expiration of one year. A member may voluntarily renounce his part ownership by a public declaration in a regular meeting of his lodge if at the time of such voluntary renunciation he shall have paid all assessments called upon him and if he shall surrender his mortuary fund certificate to the grand secretary through the lodge. . . .

"(9) Every newly accepted member of the order shall as a part owner of the mortuary fund receive a mortuary fund certificate. . . . In his application for membership, the candidate must state to whom, in case of his death, the mortuary money of $1,000.00 shall be paid. . . .

"(10) The mortuary money of $1,000.00 shall be paid by the secretary of the grand lodge upon an order signed by the grand president and grand secretary, in accordance with the conditions contained in the mortuary fund certificate of the deceased brother to the person or persons named therein as the entitled recipients of the same. The payment shall be made within sixty days after the receipt of the notice of death of the brother shall have been made in the manner required. . . .

"(12) In case a part owner of the mortuary fund shall die, whose *survivors* shall not be in possession of a death benefit certificate, the mortuary money shall not be paid out before the entitled recipient or recipients shall produce an order from the proper court.

"(13) In case a member shall die whose *survivors* shall produce a death benefit certificate, the recipients of the death-money therein named shall upon payment thereof sign the receipt or waiver of all claims printed on the back of the certificate, in the presence of the president and secretary of the lodge to which the member belonged."

Prior to December 8, 1888, one Wilhelm Pluns, an unmarried man, had become and was then a member in good standing of the defendant lodge, and on that day made a written application to the lodge for the issuance of a benefit certificate payable to "his sister, *Anna Koerts*," and represented that *Anna Koerts* was in fact his sister, whereas she was not his sister, nor in any manner related to him, nor a member of his family, all of which Pluns well knew, but the officers of the respondent did not know until after the death of Pluns. Believing these representations to be true, and relying there-

on, the officers of the defendant lodge on the last-named date issued the benefit certificate for $1,000 to Pluns, payable on his death to "his sister, *Anna Koerts,*" with a proviso allowing a change of beneficiaries by the insured in writing. No change of beneficiaries was ever made, and Pluns died February 25, 1896, unmarried, and without issue, his assessments fully paid, and he being still a member in good standing of the defendant lodge. Due proofs of his death were furnished, and demand made by the respondent for the payment of the death benefit to her, which was refused. January 30, 1897, the appellant was duly incorporated under the statutes, and still is a corporation, and is identical with the former society, and assumed all of its obligations and continues its business.

Upon these facts the trial court held that the respondent was entitled to recover on the certificate, and from judgment to that effect the lodge appeals.

For the appellant there were briefs by *Sylvester, Scheiber & Orth,* and oral argument by *Fred Scheiber.*

C. A. Koeffler, Jr., for the respondent.

WINSLOW, J. The fundamental law governing the mortuary fund when the deceased member received his certificate provided in no uncertain terms that the mortuary fund was established for the benefit of the "survivors" of a member. This law remained unchanged up to the time of the death of Pluns, and he was doubtless charged with knowledge of its terms, and must be held to have consented thereto. The first important question in the case manifestly is, therefore, as to the meaning of the word "survivors." Reference to the various sections of the code itself shows that the word is used three times in as many different sections. The first section states that the purpose of the mortuary fund is that out of it shall be paid to the "survivors" of a member after his death the sum of $1,000. The twelfth section provides

that in case of the death of a member whose "survivors" shall not possess a death benefit certificate the mortuary benefit shall only be paid to one who produces an order from the proper court. The thirteenth section provides that, in case a member shall die whose "survivors" shall produce a death benefit certificate, the recipients shall, on payment, sign a certain prescribed receipt. The word must necessarily be given the same meaning in the various sections. It cannot be supposed for a moment that it was used in one sense in one section and in a totally different sense in another section of the same code, treating of the same general subject. Bearing this in mind, it seems that there can be little doubt but that the word was used as referring to a limited class of persons. Whatever doubt there might be on this point were we considering the provisions of the first section alone, is readily dispelled when we consider the provisions of the twelfth and thirteenth sections. These last-named sections unquestionably refer to some definite class of persons as "survivors." Moreover, this conclusion is greatly strengthened when we consider the sense in which the word is commonly used. It is true that, broadly speaking, the word "survivors" includes all persons who outlive another. It is equally true that in common parlance it is universally applied only to members of a class of persons. Thus we speak of the survivors of a shipwreck, or a battle, or a railroad accident, not thereby referring to the whole surviving human race, but only to the class of people who participated in the given occurrence. So, in speaking of the death of a person, we frequently say that he left surviving his widow and certain children or other relatives. We can entertain no doubt but that the word "survivors," as used in the mortuary fund code, has some such limited significance as this. Just what relatives or connections it includes may not be easy of determination, but it seems very certain that it does not include one who, like the

respondent, was neither a relative of the deceased, nor a member of his household, nor connected with him by marriage.

The effect of this conclusion as to the meaning of the word "survivors" is yet to be considered. It does not necessarily follow that the beneficiary named in the certificate cannot recover merely because she is not one of the class named in the mortuary code of the order. In the absence of an absolute statutory prohibition, or a violation of public policy, a mutual benefit society cannot defend on this ground where it has knowingly issued a certificate payable to such a beneficiary, and the assured has fully performed the contract on his part. *Ledebuhr v. Wis. T. Co.* 112 Wis. 657, 88 N. W. 607. But this is not the question here presented. In the present case it was falsely represented to the respondent's officers that the beneficiary was one of the class for whose benefit the mortuary fund was established, and the officers relied thereon, and issued the certificate accordingly, and never ascertained the falsity of the representation until after the death of the assured. This makes a very clear case of fraud. The certificate never would have been issued in favor of the respondent except for the false representation. Her right rests upon the certificate alone, and when it is shown that its issuance in her favor was procured by fraud her claim must necessarily fall.

By the Court.—Judgment reversed, and action remanded with directions to render judgment for the appellant in accordance with this opinion.

BUTLER and others, Appellants, vs. CITY OF MILWAUKEE and others, Respondents.

October 21—November 17, 1903.

Officers: Civil service rules: Exemptions: Official bonds: Acts of deputies and assistants.

The official bond of a city clerk, general in its terms, covering, as required by law, all the administrative duties of his office, includes all acts of his deputies and assistants within the scope of their authority; and such assistants are therefore within the exemption clause of a city service act (sec. 6, ch. 313, Laws of 1895) which provides that officers and clerks, for the faithful discharge of whose duties a superior officer is required to give bond, shall not be affected by the rules of the city service commissioners as to their election, selection, or appointment.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

These facts were pleaded for a cause of action: Plaintiffs are taxpayers of the city of *Milwaukee,* a duly organized municipal corporation of this state. They sue on behalf of themselves and all others similarly situated. During the period material to this action *William H. Graebner* has been and is the treasurer of said city, and *Peter Pawinski* its comptroller. A board of city service commissioners has been duly appointed and the members thereof have duly qualified pursuant to ch. 313, Laws of 1895, and the acts amendatory thereof. Such board has duly established rules for the administration of its duties, and such rules were in force during the period material to this suit. July 14, 1902, Edward M. Schuengel, the clerk of said city, appointed as his second assistant Owen D. Murphy at a salary of $1,000 per year, and notified such board of such appointment. The appointment, by the rules of the board, was temporary, and was so approved by it to the knowledge of said clerk, the form of the approval being, "To continue until an appointment from new eligible list can be made." September 2, 1902, according to

the rules of the board, such an eligible list was completed. September 29th thereafter the board, by resolution, ended the term of office of said Owen D. Murphy as second assistant to said clerk, and the next day notified the latter thereof and that an eligible list from which to fill the vacancy had been prepared and was ready for his use. He retained Murphy as his second assistant notwithstanding, and will continue to do so in defiance of the action of the board and the law governing the subject, and said Murphy will continue to draw from the city treasury the sum of $83.33 per month as compensation for his services unless prevented by the action of the court. The city comptroller and the city treasurer have been duly notified of the foregoing facts, but they nevertheless insist that if the city clerk retains Murphy as his second assistant they shall continue to treat him as entitled to receive from the city treasurer compensation for his services at $83.33 per month. By an ordinance duly adopted by the common council of the city of *Milwaukee* its city clerk is required to give an official bond in the sum of $10,000. Said clerk, in compliance with such ordinance, gave such bond to the city of *Milwaukee,* which was duly approved. The bond was general, covering all his duties as city clerk. The office of second assistant to the city clerk was created by a city ordinance duly adopted by the common council.

Upon such facts judgment was asked enjoining the payment by the city treasurer of any salary claim of Murphy as second assistant to the city clerk, and requiring such treasurer to restore to the public funds the amount of money paid by him to Murphy for services rendered subsequent to the action of the board ending his term of office.

Defendants demurred to the complaint for want of legal capacity to maintain the action, because no proof of injury to plaintiffs was shown, and for insufficiency. The demurrer was sustained. Plaintiffs appealed from the order accordingly entered.

Edgar L. Wood, for the appellants, contended, *inter alia,* that the wisdom of laws governing the appointment of public servants based upon merit has become generally recognized by constitutional and statutory enactment in many states and by Congress. These constitutional provisions and laws should receive a liberal construction which shall carry out, rather than defeat, the purpose sought to be accomplished. *People ex rel. Tate v. Dalton,* 158 N. Y. 204; *People ex rel. Flood v. Gardiner,* 157 N. Y. 520; *People ex rel. Miller v. Lyman,* 156 N. Y. 407; *People ex rel. Sears v. Tobey,* 153 N. Y. 381; *Chittenden v. Wurster,* 152 N. Y. 345; 6 Am. & Eng. Ency. of Law (2d ed.) 88. The civil service law furthermore relieves the appointing officer from responsibility for the acts of the subordinates when it deprives the officer of the power of appointment and designates who shall be appointed, and under these conditions it is held, so far as authority upon the proposition has been found, that the principal officer is not liable for the acts of such subordinate clerks. *Murphy v. Comm'rs,* 28 N. Y. 134; *Wiggins v. Hathaway,* 6 Barb. 632; *Bailey v. Mayor,* 3 Hill, 531.

Carl Runge, city attorney, for the respondents.

MARSHALL, J. The demurrer seems to have been sustained below solely upon the ground that the second assistant city clerk is within the exemption clause of sec. 6, ch. 313, Laws of 1895, which provides that "officers and clerks, for the faithful discharge of whose duties a superior officer is required to give bond, . . . shall not be affected" by the rules of the city service commissioners "as to their election, selection, or appointment." If such ground was well taken it is conceded by counsel for appellants that the decision complained of must be affirmed.

The quoted language seems plain. If there is any ambiguity therein giving warrant for the court to search for the true meaning thereof by the light of rules for judicial con-

struction, we are unable to discover it. The obvious legislative idea voiced therein is that, as to an officer whose fidelity to the duties of his position is secured by the bond of a superior, no further security in that regard is required for the public interests, and that interference with the appointment or election of the inferior regardless of the wishes of the superior and responsible head of the service would be unjust. That being the plain policy of the law, expressed in general terms applicable, reasonably, to one inferior officer as well as to another, it would be going beyond legitimate judicial construction to search for and declare exceptions.

The foregoing leaves very little that needs to be said. The complaint shows that the city clerk was by law required to give a bond for the faithful discharge of the duties of his office. That included, in the administration of such office, acts done by deputies and assistants as well as those done by the clerk himself. In legal effect all the acts are those of the responsible head, the city clerk, and so are within the terms of the official bond. A principal officer is always liable for the official misconduct of one of his assistants, and cannot escape liability therefrom upon the ground that it was not a personal fault of his. The law knows only the superior officer in such cases. That is too elementary to require discussion.

The place of a mere assistant to a superior officer is one of less dignity than that of a deputy (9 Am. & Eng. Ency. of Law, 369), yet the latter, in the absence of some express provision to the contrary, is regarded in law as the mere private agent of his superior. He is supposed to act only in the name of his superior and upon the latter's responsibility. The principal and his deputy or deputies are regarded as but one officer and that officer the principal. *Russell v. Lawton,* 14 Wis. 202. It is upon that principle that the official bond of an officer is generally regarded as covering all acts of his deputies and assistants within the scope of their authority,

the same as if performed by himself personally, though he may be entirely ignorant of their conduct. It must follow that the bond of the city clerk in this case, general in terms, covering the entire administrative duties of his office, includes all acts done within the scope of the administration by his second assistant. That satisfies the letter and spirit of the exemption clause of the city service act.

By the Court.—The order is affirmed.

SPEISER and another, by guardian *ad litem,* Appellants, vs. PHŒNIX MUTUAL LIFE INSURANCE COMPANY, Respondent.

October 22—November 17, 1903.

Life insurance: Evidence: Certified copies: Knowledge of falsity of statements by assured: Waiver of forfeiture.

1. In an action upon a life insurance policy an officer of another company testified by deposition that the assured had applied to his company for insurance, and produced the original application and the accompanying declarations of the assured and the medical report thereon. He refused to part with such originals, and certified copies were attached to the deposition. *Held,* that such copies were admissible in evidence.
2. One who, though not a regular agent of an insurance company, solicited life insurance on its behalf, made application for a policy through a general agent of the company, and, when the policy was issued, delivered it to the assured, was, under sec. 1977, Stats. 1898, the agent of the company in procuring such insurance.
3. Knowledge by such an agent of the falsity of statements in the application of the assured which were therein warranted to be true, and delivery of the policy notwithstanding such knowledge, constituted a waiver of the forfeiture which would otherwise have resulted from such falsity, in the absence of any collusion between the agent and the assured or any one on behalf of the beneficiaries.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

It appears from the record, and is undisputed, that April 17, 1900, the defendant issued its policy of insurance on the life of Delia Speiser, of Milwaukee, for the amount of $3,000, payable to her minor children, the plaintiffs in this action; that August 19, 1900, the assured, Delia Speiser, died in Milwaukee; that August 31, 1900, notice and proofs of her death were given to and received by the defendant; that February 9, 1901, Morris Speiser was appointed guardian *ad litem* of the plaintiffs, and that March 4, 1901, this action was commenced to recover such insurance; and the complaint alleges the facts stated, and that the assured had performed all the conditions of the insurance contract on her part.

The defendant answered by way of admissions, denials, and counter allegations to the effect that in her application for such insurance the insured stated (1) that she did not then have any disease or disorder; (2) that during the past seven years she had no medical advice, except in respect to her confinement; (11) that she had never had difficulty in breathing, nor any disease of the heart, nor palpitation of the heart, nor dropsy, nor swelling of the feet or face; (12) that her mother died at the age of fifty-five by reason of change of life, which lasted two years, after previous good health; that she had one sister living in good health at the age of forty-four, and one who died at the age of forty-five of change of life, which continued for two years, after previous good health; that none of her uncles, aunts, or grandparents had any disease of the heart or kidneys; that she had never applied to the defendant, nor any other company or association, for any insurance which had not been granted, nor which had been delayed or modified in kind or rate. The answer fur-

ther alleges, in effect, that each and all of such answers were warranted in the application to be full, complete, and true, but that each and all were false and untrue to the knowledge of the assured; that October 21, 1899, she applied to the Home Life Insurance Company of New York for insurance, and the same was refused October 28, 1899; that at the time of the application of the assured to the defendant for the insurance in question she was afflicted with fatty degeneration of the heart, and knew of such disease, and had previously consulted several physicians in relation thereto; that the mother of the assured died of dropsy; that her sister, mentioned, died of Bright's disease; that the living sister mentioned was in poor health, and suffered from diabetes; and that in issuing the policy the defendant relied upon the truthfulness of the statements contained in the application.

For a second defense the answer alleges, in effect, that by the contract of insurance the policy was not to take effect until the first premium should be paid to the defendant or its agent while the assured was in good health, and that when it was paid, August 17, 1900, the assured was suffering from organic disease of the heart, to her knowledge.

The third defense alleges, in effect, that by the contract of insurance the defendant was at liberty, in case any of such answers should be untrue, to cancel the policy as therein specifically set forth, upon repaying the cash premium paid, and that November 6, 1900, the defendant tendered back the premium of $99.66 paid, and demanded a cancellation of the policy, and that the same was deposited in court to make such tender good.

At the close of the trial the court directed a verdict in favor of the defendant, and from the judgment entered thereon accordingly the plaintiffs appeal.

For the appellants there was a brief by *Roemer & Aarons*, and oral argument by *C. L. Aarons*

For the respondent there was a brief by *Miller, Noyes & Miller,* and oral argument by *George P. Miller.*

CASSODAY, C. J. In the deposition of the vice president of the Home Life Insurance Company of New York he testified to the effect that October 21, 1899, the assured made application to that company for insurance, and the witness produced the original application for $2,000 life insurance, signed by Delia Speiser, and the same was marked as an exhibit attached to the deposition; but, as the witness refused to allow such original to go out of the office, a certified copy was produced, and annexed to such deposition in place of the original. That company could not have been compelled to surrender its private papers. To prove the contents of such papers, therefore, secondary evidence was essential. The correctness of the copy is not questioned. Its admissibility, under the circumstances of this case, cannot be seriously doubted. *Bonner v. Home Ins. Co.* 13 Wis. 677; *Wis. River L. Co. v. Walker,* 48 Wis. 614, 4 N. W. 803; 1 Jones, Ev. § 217, and cases there cited. The same is true as to the admission of copies of Mrs. Speiser's declarations in making such application to the Home Life Insurance Company and the medical report thereon to that company. Her application was rejected October 28, 1899.

2. The important question in this case is whether the court was justified in directing a verdict in favor of the defendant. It appears from the testimony of the medical examiner that Mrs. Speiser's application was so rejected by the Home Life Insurance Company not on account of the condition of her heart at that time, but on account of albumen in the urine, indicating "disease of the kidneys." This shows that the statement in her application to the defendant for insurance to the effect that she had never applied to any other company or association for any insurance which had not been granted

was untrue. The question recurs whether there is evidence tending to prove that it was waived by issuing the policy in question. The testimony of the witness Heinemann tended to prove that during the latter part of 1899 he solicited Mrs. Speiser for life insurance; that he wrote her a policy in the Home Life; that he made the application through the agent at that time of the Home Life Insurance Company of New York; that he (the witness) was acting for that company at that time; that such agent arranged for that company's medical examiner to examine Mrs. Speiser; that such examination was made, and she was rejected by reason of albumen having been found in the urine; that, after she was so rejected by the Home Life Insurance Company, he saw Mr. and Mrs. Speiser again in the following spring, relative to the writing of life insurance on behalf of the defendant in this action; that he made application at that time through the defendant's general agent for a combined policy for both Mr. and Mrs. Speiser for the amount of $3,000; that they were examined by the medical examiner at that time; that Mr. Speiser was rejected, and laid over for one year, but that Mrs. Speiser was accepted, and a special policy was made to her; that he saw the policy when it was returned from the home office to the general agent; that he (the witness) looked over and examined the policy, and delivered it to Mrs. Speiser; that a copy of the application that had been made by her was in the policy; that he read the whole policy over, including the copy of the application, before he delivered the policy to Mrs. Speiser; that he had known Mrs. Speiser and her family for eighteen or twenty years prior to her death; that he did not know her mother personally, but did know her father and both of her brothers, and that he had been acquainted with her two sisters mentioned for eighteen or twenty years; that he heard several years before that one had Bright's disease, and the other, if he was not mistaken, had

some complication of the heart; that he had all the facts so stated by him in mind at the time he wrote the application and delivered the policy in question to Mrs. Speiser; that at the time the policy was written he did not know that Mrs. Speiser was herself suffering from any disease; that he knew that he had heard prior to that time that she had palpitation of the heart; that he knew at the time he delivered the policy to Mrs. Speiser of the facts stated relative to her health, but that he did not tell such facts to the general agent of the defendant, or to any officer or agent of the defendant, nor anything about the knowledge he had of her prior rejection by the Home Life Insurance Company; that the reason why he did not inform the general agent was that every agent of Milwaukee or any other city having a rejected client tries to put them in some other company if they can.

The statute declares that:

"Whoever solicits insurance on behalf of any insurance corporation . . . or transmits an application for or a policy of insurance, other than for himself, to or from any such corporation, or who makes any contract for insurance, or collects any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business of like nature for any insurance corporation, . . . shall be held to be an agent of such corporation to all intents and purposes unless it can be shown that he receives no compensation for such services." Sec. 1977, Stats. 1898.

Heinemann, with the authority of the defendant, certainly performed several of the acts mentioned in this section of the statutes. We are unable to escape the conclusion that such testimony tended to prove that Mr. Heinemann was the agent of the defendant in procuring the insurance in question. The trial court seems to concede that he was "the agent or broker who solicited the insurance," but held that he "was not such an agent with knowledge of the condition of the deceased as to bind the company." Certainly, his testimony

tends to prove that he had full knowledge of the fact that Mrs. Speiser's application for insurance in the Home Life Insurance Company of New York had been rejected, and the ground upon which it had been rejected. There does not seem to have been any evidence of any untruthful statements contained in her application for insurance in the defendant company which were unknown to Heinemann, or of which he did not have full knowledge at the time such application was made, and before the policy was delivered to Mrs. Speiser. Assuming that Heinemann had such knowledge, and that he was the defendant's soliciting agent within the meaning of the statute quoted, then we are called upon to consider the legal effect of delivering the policy under such circumstances.

It was held by this court long ago in an elaborate opinion by DIXON, C. J., that:

"An agent of an insurance company, who is authorized to take risks and issue policies for the company, may *waive* a condition in the policy to the effect that any change in the title or possession of the property insured shall render the policy void. Where the agent, with a full knowledge of the fact that such a change of title or possession has occurred, receives a premium and issues a renewal receipt, this constitutes a *waiver* of such condition." *Miner v. Phœnix Ins. Co.* 27 Wis. 693.

That case has frequently received the sanction of this court. *Renier v. Dwelling House Ins. Co.* 74 Wis. 89, 94, 95, 42 N. W. 208, and cases there cited. In this last case it was contended that by the terms of the contract the soliciting agent was never authorized to make contracts of insurance nor to issue policies, but merely to receive applications and forward them to the company. But it was held, in effect, that, as the local agent had performed the several acts mentioned in the statute quoted in behalf of the company and with its authority, the latter could not disclaim his agency

in the doing of anything necessarily implied in the specific acts thus authorized. And it was there held that

"the local agent, under the authority given and the statute cited, had the implied authority to waive any answers in the application or stipulation in the policy as to the then condition of the property or the existence of the mortgages, and by accepting the premium and issuing the policy the company ratified such waiver and estopped itself from disclaiming such agency." 74 Wis. 95, 42 N. W. 210.

Such ruling has been steadily adhered to. *Schultz v. Caledonian Ins. Co.* 94 Wis. 43, 68 N. W. 414, and cases there cited; *Johnston v. N. W. Live Stock Ins. Co.* 94 Wis. 121, 68 N. W. 868; *St. Clara Female Academy v. N. W. Nat. Ins. Co.* 98 Wis. 263, 264, 73 N. W. 767; *Hobkirk v. Phœnix Ins. Co.* 102 Wis. 16, 78 N. W. 160, and cases there cited.

Counsel seek to escape the effect of the rule of law mentioned by contending, in effect, that Heinemann deliberately perpetrated a fraud upon the defendant; that he conspired with the assured to rob the defendant by fraudulently waiving the conditions contained in the contract. He cites the general rule of law "that notice to the agent is, in contemplation of law, notice to a principal" (1 Am. & Eng. Ency. of Law, 2d ed. 1144), and then relies upon the exception that the rule is not applicable "where the agent *colludes* with a third party," since the rule is "for the protection of innocent third persons, and not for those who use the agent to further their own frauds upon the principal" (Id. 1146). The same principle is declared, in effect, by this court in a case cited by the same counsel, wherein it is held that:

"A principal is not bound by the unauthorized and fraudulent acts of an agent, done in pursuance of a corrupt conspiracy between such agent and the person who seeks to obtain the benefit of the fraud. Thus, where the agent of a mutual aid association and the insured, both knowing of a by-law forbidding the insurance of any person over fifty

years old, conspired together to procure the insurance by falsely representing that the insured was under fifty years, the association is not bound by the acts of the agent, and there is no waiver of the restriction in the by-law." *Hanf v. N. W. Mut. Aid Asso.* 76 Wis. 450, 45 N. W. 315.

The difficulty with the contention is that it does not appear from the undisputed evidence that there was *collusion* between Heinemann and the assured, or any one in behalf of the beneficiaries, to defraud the defendant, nor that there was a corrupt conspiracy between them to defraud the defendant. It simply appears that there were certain statements in the application which Heinemann knew to be untrue, but nevertheless, in behalf of the defendant, consented to issue the policy. It is substantially the same as in the numerous cases cited, and many others which might be cited, where the local agent agreed to issue the policy upon an application containing material statements which the agent knew at the time to be untrue. The question should have been submitted to the jury.

3. One defense seemingly relied upon is that the policy was not to take effect until the first premium should be paid while the assured should be in good health, and that it was not paid until August 17, 1900, two days before the death of the assured, and when she was not in good health, but was, to her knowledge, suffering from organic disease of the heart. It is enough to say that it appears from the record that the first premium was paid at the time the policy was issued, April 17, 1900, and a receipt to that effect, signed by the secretary of the defendant, is in the record. What has been said obviates the necessity of considering any of the other questions suggested by the appellants.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

MEYER, Respondent, vs. HAFEMEISTER, Appellant.

October 22—November 17, 1903.

Payment: Burden of proof: Instructions to jury: Evidence: Transactions with agent since deceased: Cross-examination.

1. **An instruction that it was incumbent upon defendant to establish his defense of payment "by clear and satisfactory evidence" was erroneous and presumably prejudicial, although the court had already correctly charged that the burden was upon him to show payment "by a fair preponderance of the evidence."**
2. **Under sec. 4070, Stats. 1898, defendant was not competent to testify as to transactions between himself and plaintiff's attorney, since deceased, where plaintiff had offered no evidence concerning such transactions.**
3. **The question being whether a certain mortgage had been received by plaintiff in full payment and satisfaction of defendant's liability on a judgment against him and others, defendant should have been allowed to elicit from plaintiff, on cross-examination, the negotiations and conversations actually had with him concerning the payment and satisfaction of said judgment, and what took place when securities and property were deposited and conveyed by him to apply on the liability.**

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This is an action by plaintiff, as trustee, to recover the sum of $152.63, with interest, as a balance due him from defendant on a judgment against defendant and others. It appears that defendant, one Kretschmar, and four other persons had signed as bondsmen for J. B. Koetting in the estate of Lurinda Shepardson, deceased; that Kretschmar was insolvent, and that plaintiff could collect nothing from him, and therefore sought to enforce the liability against defendant and the other four bondsmen; and that he recovered judgment for the full amount.

It is admitted in the record that plaintiff had a judgment

claim against defendant on November 1, 1897, amounting to $13,152.63, and that plaintiff received from defendant a $13,000 real-estate mortgage on this indebtedness. Plaintiff alleges that there remained due him this sum of $152.63 on this judgment, over and above the mortgage payment of $13,000; that on or about April 28, 1900, defendant agreed to pay him this sum if he would satisfy in full this judgment against him. Plaintiff alleges that he relied on this promise, and satisfied the judgment as agreed. Defendant claims this mortgage was given in full payment and satisfaction of his liability on the judgment, and was so received by plaintiff.

The case was tried before a jury. The material question litigated was whether this mortgage was received in full payment and satisfaction of defendant's liability on the judgment. At the conclusion of the trial, judgment was awarded in plaintiff's favor for the amount demanded, with interest, and from such judgment defendant appeals.

For the appellant there was a brief by *Doerfler, McElroy & Eschweiler,* and oral argument by *F. C. Eschweiler.*

For the respondent there was a brief by *Miller, Noyes & Miller,* and oral argument by *George P. Miller.*

SIEBECKER, J. Defendant contends that the circuit court committed error in instructing the jury upon the rule of the burden of proof applicable to the defense of payment. The court instructed the jury at length upon the burden of proof and the preponderance of evidence. The following instruction was given as bearing on the defense of payment:

"The burden of showing the $13,000 mortgage given by the defendant to the plaintiff as trustee was a payment in full of the entire amount due under the judgment against the defendant is upon the defendant, and he must satisfy you *by a fair preponderance of the evidence* that the giving and acceptance of such mortgage constituted a payment in full of the $152.63 sued for in this action."

The court then instructed the jury in what issues the burden of proof rested on the plaintiff, and that it devolved on him to establish his case by a fair preponderance of the evidence. The court, however, did not submit the case upon these instructions, which directed the jurors' attention to the rules of law upon this subject, but proceeded further to inform the jury as to the burden resting upon defendant to establish his claim of payment, in the following language:

"The burden of proof is on the defendant herein as to all the material facts necessary to sustain his contention that he has satisfied and paid the same, and it is incumbent upon the defendant to establish those allegations *by clear and satisfactory evidence.*"

The first instruction above referred to correctly charges that the burden was on the defendant to establish payment of plaintiff's claim and that the fact of payment must be established *"by a fair preponderance of the evidence;"* but the instruction which followed on the subject modified this rule in a material respect, in that it informed the jury that it was incumbent on the defendant to establish the fact of payment *"by clear and satisfactory evidence,"* which negatives the idea that a mere preponderance of evidence is sufficient to warrant the jury in finding that payment was made as claimed. The last instruction given informed the jury that the fact of payment must be shown by evidence establishing it to a higher degree of certainty than its mere preponderance. It is argued, though this rule be erroneous, it should not be held prejudicial, because the court also instructed the jury correctly upon the subject. But what rule did the jury follow? It is fully as probable they followed the one rule as the other in their determination of the issues. They found payment was not established as alleged by defendant. This may have resulted because they believed the proof failed to show payment to that degree of certainty as defined and required by the last instruction, though believing that the

weight of the evidence adduced preponderated in defendant's favor. Since the instructions may have prejudiced the defendant upon this issue, it must be held to constitute reversible error.

Numerous errors are assigned upon the court's rulings on objections as to the admission and rejection of testimony. An exception is argued upon the ruling excluding any conversation between defendant and plaintiff's attorney Geo. H. Wahl, who, it appeared, was deceased, upon the ground that defendant was not competent to establish any transaction with plaintiff's deceased agent. No evidence had been offered by plaintiff concerning the transactions between the deceased and defendant, to remove the bar of the statute covering the subject. This precluded defendant from giving any such conversation when objected to by the adverse party. We perceive no error in the ruling.

Many of the exceptions to these rulings pertain to the exclusion of evidence tending to show the nature and amount of the original liability out of which this claim arose, and the negotiations pertaining to its payment, and the insolvency of Mr. Kretschmar. We find it unnecessary to discuss each exception in detail, since a new trial must be directed upon other grounds. The record, however, shows that the trial court limited the cross-examination of plaintiff too strictly. The jury should have been informed of the facts and circumstances surrounding these negotiations, to give them a proper understanding of their significance and aid them in properly applying the evidence to the controverted issues. For this purpose, it was proper to elicit from the plaintiff the negotiations and conversations actually had with him concerning the payment and satisfaction of the original judgment, and what took place when the securities and property were deposited and conveyed by him to apply on this liability.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

MANITOWOC MALTING COMPANY, Respondent, vs. MILWAUKEE MALTING COMPANY, Appellant.

October 22—November 17, 1903.

Unfair competition in trade: Imitation of trade symbol: Injunction.

1. Defendant's trade symbol or device is *held* to be an imitation, calculated to deceive, of that which plaintiff had previously used upon its cars, sacks, cards, billheads, and advertising matter, and under which plaintiff had built up a profitable business in the manufacture and sale of malt made by the so-called "eight-day process"—the striking features of both devices being their circular shape, a large figure 8, and encircling heads of barley, although there were differences in coloring and in the words attached; and the use of such device by defendant constitutes unfair competition in trade, against which equity will protect the plaintiff.
2. The facts that such malt is not retailed to the public, but sold only to brewers and distillers, and that the defendant has not used its device upon cars or sacks, but only upon sample cans, cards, letterheads, etc., go only to the degree of deception and consequent injury, but do not affect plaintiff's right to protection.
3. In an action to restrain the use of such trade device, if the fact is established of an imitation well calculated to deceive, it is not necessary to show by specific proof that purchasers have actually been deceived.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an action in equity to perpetually enjoin the defendant from using in its business a certain symbol or device alleged to be an infringement on the plaintiff's trademark. At the date of the commencement of this action both parties were, and still are, engaged in the manufacture of malt, the plaintiff's plant being at Manitowoc, and the defendant's at Milwaukee; and both were using what is called the "eight-day process," by which malt is germinated eight days, which, it seems, is an improvement on former methods

by which malt is germinated in five or six days. The plaintiff had commenced manufacturing by this process in the latter part of the year 1900, and had built up a large and profitable trade, using the following symbol or device, which was duly registered as a trademark in 1901:

In this symbol the figure 8 and the barley heads were colored in yellow, and the circular band tinted in pink. This device it used in an enlarged form upon cars in which it shipped malt, in which case the figure 8 and the barley heads were tinted yellow, and the whole background was colored a bright red. It also used the device upon its cards, billheads, letter heads, and advertising matter, and its malt had become favorably known to the public, and was distinguished by this device.

The officers of the defendant visited the plaintiff's malthouse in October, 1900, and inspected the processes used, and were shown the trademark. They then proceeded to construct a plant for the manufacture of eight-day malt, and commenced to manufacture and sell the same in the latter part of the year 1901. At first they used no device or trademark, but shortly before the commencement of this action they commenced to use upon their cards, billheads, envelopes, and sample cans the device shown on page 545.

The figure 8 in this device is colored a bright red, the barley heads are gilt, and the balance of the device is dark green, except the words "Slow Grown Malt," which are red.

The court found that the defendant's symbol or device was calculated to deceive and mislead purchasers of malt into the belief that the defendant's malt was manufactured by the plaintiff; that the defendant's symbol is sufficiently similar

to the mark used by the plaintiff to cause deception and confusion among purchasers and consumers of malt; that the use of said symbol by the defendant has damaged the plaintiff, and threatens to cause great and irreparable injury in the future; that this action was brought promptly upon the ap-

pearance in the market of the defendant's cards bearing said symbol, and that no proof of actual damage was given at the trial.

As conclusions of law the court found that the plaintiff's symbol constituted a trademark, and that the defendant's symbol is an infringement of said trademark; that the defendant's acts also constituted unfair competition in trade; and that the plaintiff is entitled to judgment restraining the defendant from using said symbol, or any other symbol in imitation of the plaintiff's symbol, in the sale of its goods. Judgment was entered in pursuance of these findings, and the defendant appeals.

For the appellant there were briefs by *Winkler, Flanders, Smith, Bottum & Vilas,* and oral argument by *F. C. Winkler.* They contended, *inter alia,* that in a case depending upon the fraud of "unfair competition," the facts must evince a natural tendency to mislead, and the misleading must be as to the essential fact that the party ordering or buying is led to believe that he is buying of another party. *Shaver v.*

Heller & M. Co. 108 Fed. 821; *Keller v. B. F. Goodrich Co.* 117 Ind. 556; *Pillsbury v. Pillsbury-Washburn F. M. Co.* 64 Fed. 841; *Collinsplatt v. Finlayson,* 88 Fed. 693; *Samuels v. Spitzer,* 177 Mass. 226.

For the respondent there was a brief by *Erwin & Wheeler,* and oral argument by *Lyman G. Wheeler.* As to the degree of imitation necessary to constitute unfair competition, see *Pillsbury v. Pillsbury-Washburn F. M. Co.* 64 Fed. 841; *Collinsplatt v. Finlayson,* 88 Fed. 693. A fraudulent intent will be inferred from unexplained resemblances in the devices themselves. *Dennison Mfg. Co. v. Thomas Mfg. Co.* 94 Fed. 651; *Walter Baker Co. v. Sanders,* 80 Fed. 890; *Lalance & G. Mfg. Co. v. Nat. E. & S. Co.* 109 Fed. 317.

WINSLOW, J. The trial court concluded that the plaintiff was entitled to the relief sought on two grounds: first, because the defendant had infringed upon the plaintiff's trademark; and, second, because the facts showed unfair competition in trade. In the view we have taken of the case, we find it unnecessary to decide whether the plaintiff's device constitutes a valid trademark, and our judgment herein is not to be construed as affirming this finding. We are entirely satisfied, however, that the court was right in adjudging the use of the defendant's device to be unfair competition in trade, and upon that ground the judgment will be affirmed.

Unfair competition in trade is not confined to the imitation of a trademark, but takes as many forms as the ingenuity of man can devise. It may consist of the imitation of a sign, a trade-name, a label, a wrapper, a package, or almost any other imitation by a business rival of some distinguishing earmark of an established business, which the court can see is calculated to mislead the public and lead purchasers into the belief that they are buying the goods of the first manufacturer. The first question is whether there is an imitation in fact, and this must be determined by inspection

of the rival symbols or devices. It is not to be expected, of course, that there will ever be an exact copy. The imitator will always seek to introduce enough differences to justify a claim that there has been no imitation, while incorporating enough similarities to carry the general effect of the original design to the mind of the unwary purchaser.

Viewing the two devices in the present case, and remembering that the plaintiff's device had been in use upon its cars, its sacks, its cards, billheads, and advertising matter, and a large and profitable business built up thereunder, for a year before the defendant's device was adopted, we can entertain no doubt of the fact that a clear attempt to imitate is shown. The prominent features of the plaintiff's device are the large figure 8 and the encircling heads of barley. Turning to the defendant's device, we find both of these features in substantially the same form, though perhaps more artistically carried out in color. It is true that the words incorporated with the figure 8 are different, but it is significant that both sets of words convey exactly the same idea, namely, that the malt is grown eight days. The striking features of both devices are the circular shape, the barley heads, and the large figure 8. The conclusion of imitation from the similarity in these respects is irresistible. Nor is that conclusion at all shaken by the difference in the words attached, or the fact that the defendant has incorporated its name in the device.

The fact of imitation being established, and such imitation being well calculated to deceive, it is not necessary to show by specific proof that purchasers have been actually deceived. A court of equity will act before the injurious consequences of the unfair competition have made themselves manifest, if the imitation is established, and the consequent deception seems certain to result. *Collinsplatt v. Finlayson*, 88 Fed. 693.

It is urged that because the malt is only sold to brewers

and distillers, and not retailed to the public, there is no reasonable probability of deception; also that because the defendant has only used the device upon sample cans, cards, billheads, and letter heads, and not upon cars or sacks, purchasers are not likely to be misled. Both of these contentions only go to the degree of the deception and consequent injury. If the plaintiff is entitled to protection against unfair competition at all, it is entitled to protection against unfair competition in a small way as well as in a large way, provided it be substantial.

By the Court.—Judgment affirmed.

MOLLER, Respondent, vs. J. L. GATES LAND COMPANY, Appellant.

October 22—November 17, 1903.

Contract of employment: Terms: Evidence: Estoppel.

Plaintiff claimed that he had been employed by defendant at a certain monthly salary in addition to the payment of his expenses and a commission on sales made by him. From time to time during his term of service he rendered statements of account in accordance with such claim, and defendant's officers made no objection thereto, but, with full knowledge thus brought home to them of plaintiff's understanding of the contract, gave no intimation that they understood it otherwise, for about eighteen months, while they encouraged plaintiff to continue his services. *Held*, that defendant was estopped to deny that the contract was as claimed by plaintiff.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

Action on contract to recover a balance alleged to be due thereon. The claim of plaintiff was that he was employed by defendant as its agent to promote the settlement upon by, and sale of its lands to, immigrants from Europe, the agreed

compensation for his services being a salary of $100 per month commencing February 1, 1899, payment of his expenses incurred in the course of his employment, including those incident to his journey from Milwaukee to the place selected for his headquarters in Europe, and allowance of a reasonable commission upon receipts for lands sold; that he continued in defendant's employ under such agreement from February 1, 1899, to August 18, 1901, during which time he incurred expenses chargeable to defendant under the agreement aforesaid to the amount of $1,315.85, and sold lands upon which he was entitled to a commission of $200; that the entire amount of indebtedness which accrued to him, including salary, expenses and commission, was $4,575.85; that the amount received thereon from defendant was $2,540, leaving $2,035.85 due, for which judgment was asked.

The employment of plaintiff by defendant was admitted by the answer, but it was alleged that the agreed compensation for his services was expenses not exceeding $2,000 and a commission of two per cent. upon lands sold by or through his instrumentality. It was denied that any commission was earned under such agreement, and alleged by way of defense, and also by way of counterclaim, that plaintiff had been paid the sum of $577.40 in excess of the $2,000 agreed upon. Judgment was asked upon the counterclaim for the excess payment. The allegations of the counterclaim were duly put in issue.

The case was tried before a referee, who found the facts as to the agreement in plaintiff's favor. The balance found due by the referee was $1,835.85. The referee's conclusions were affirmed by the circuit court and judgment was accordingly rendered, from which this appeal was taken.

The cause was submitted for the appellant on the brief of *Winkler, Flanders, Smith, Bottum & Vilas,* and for the respondent on that of *Joshua Stark.*

MARSHALL, J. There are several assignments of error upon this appeal. All of them may well be reduced to this: The trial court erred in confirming the findings of fact made by the referee as to the contract between the parties entitling respondent to $100 per month as a salary, a reasonable commission upon the amount realized for the sale of lands made by him or through his instrumentality, and the expenses incurred within the scope of his employment. The evidence of respondent was clear and positive to that effect. It was corroborated by the fact that he rendered statements of account from time to time during his term of service in all respects according thereto, particularly that feature thereof constituting the principal controversy, namely, the salary feature, and that no intimation was made by defendant's officers for a long period of time that such statements were not correct; that with full knowledge thus brought home to appellant of what respondent's view of the contract of employment was, its officers remained silent as regards their understanding of the matter for about eighteen months, while they encouraged him to continue to serve under such contract. As claimed by respondent's counsel, and doubtless as viewed by the referee and the trial court as well, such conduct on the part of appellant's officers is not in harmony with any reasonable theory, consistent with their being honest men, other than that when such statements were received they viewed the contract substantially as respondent did. Their failure upon the trial to explain such conduct certainly goes very far to corroborate respondent's evidence and to impeach theirs. There are other circumstances corroborative of the testimony of respondent, to which reference might be made, among which is the unreasonable character of the agreement claimed by appellant. The testimony of James L. Gates, who seems to have exercised all the power of the company in the matter, if true, would show that respondent agreed to take all the risk of the success of the business in which he was to engage,

except that of expenses, strictly so called, up to $2,000 per year, and to look wholly to the uncertain result of his labor as to making sales of land for compensation for his time, and to even leave it then further dependent upon uncertainty as to what might be considered reasonable. The testimony of Gates was that the respondent's compensation for his time should consist solely of a reasonable commission upon sales, limited, however, to two per cent. upon the proceeds thereof. Aside from the unreasonable feature referred to, Gates's testimony was further weakened by the fact that upon the first occasion of his differing with respondent as to the contract, which occurred, as before indicated, some eighteen months after he knew from statements rendered what respondent's view was, he said nothing about the latter's compensation for services being limited to a reasonable commission not exceeding two per cent. on sales of land. He then said that the agreement was that the respondent should have, for services and salary, expenses and a reasonable compensation or commission for work actually accomplished. No suggestion was then made that the expense account should not exceed $2,000 or any other sum, or that compensation for time should be upon the basis of a commission upon sales, as claimed in the answers subsequently served and in the testimony of Mr. Gates upon the trial. "Compensation or commission" is a very uncertain term. It might be construed reasonably in either of several ways; and the same is true of the term "work actually done." That seems to have been appreciated when the witness came to verify appellant's answer. He must have known as well when he first took issue with respondent as to the contract, what occurred between them, as later; and he alone did the talking on behalf of the company, if we are to believe his testimony. He assumed, according to his language, to be the company. The language used by him upon the trial was this:

"I made an agreement that I would put in $2,000 to defray expenses in the effort to procure settlers for our land;

and further in the event of settlers coming that we succeeded in selling that we would allow him a small commission not exceeding two per cent."

He said nothing about any person being concerned in the conversation with respondent when the contract was closed but himself, or that any other person was then present.

To corroborate the testimony of James L. Gates appellant depended upon his son, Robert L. Gates, the secretary of appellant, and Julius Jungblut, its treasurer. Their interests in the result of the litigation, and relations to James L. Gates, warranted the court in not giving to the testimony of the three much greater, if any more, weight than to the testimony of James L. Gates standing alone. The claim is made by appellant that Jungblut and Robert L. Gates knew personally what passed between James L. Gates and respondent at the time the contract was made, and that their evidence in that regard was not given due weight by the referee, he regarding the same as hearsay. We find nothing in the findings and opinion of the referee indicating such want of appreciation. The referee said in his opinion that the evidence of Jungblut and Robert L. Gates was "to a large extent hearsay," based upon general conversations between them and James L. Gates in the absence of respondent, rather than statements of what the witnesses heard pass between James L. Gates and respondent. It seems that he had good warrant for so viewing the evidence. Jungblut's evidence did relate largely to what occurred between himself, James L. Gates, and Robert L. Gates in the absence of respondent. He testified that he did not remember of having any conversation with respondent himself as to the contract. He said further, it is true, that he heard the arrangement between James L. Gates and respondent and that it was that the company would spend $2,000 through respondent in exploiting its lands abroad, and in addition would pay him a commission of not exceeding two per cent. upon sales made, nothing being said

about salary, and the term "expenses" not being used. The greater part of the testimony of Robert L. Gates is foreign to any conversation between him and respondent or between the latter and any one else as to the contract. He did not testify to any statement made by James L. Gates or by respondent at the time the contract was made, or testify distinctly that he heard what was then said. He gave his conclusions as to what the contract was and in a way consistent with his not having heard a word of what passed between James L. Gates and respondent. His direct examination closed without his claiming to have been present at such time. However, near the close of his cross-examination he said, in effect, that the contract was closed at appellant's office in Milwaukee, and that he, James L. Gates, Jungblut, and respondent were present. However, he failed to state definitely as to himself and Jungblut, more than that they were in or about the office. He did not state that they heard what passed between James L. Gates and respondent, or that they took part in the conversation as to the contract. James L. Gates, as before indicated, testified, in effect, that the conversation was wholly between himself and respondent. On the whole it seems that the referee and the trial court gave to the testimony of James L. Gates and to that of his son and Jungblut, all the consideration the same was entitled to.

We cannot hold that the evidence produced by appellant clearly preponderates over that of respondent, strongly corroborated as it is, as before indicated. The evidentiary effect of the delay of eighteen months in objecting to respondent's view of the contract, while encouraging him to continue in the execution thereof, is to admit the correctness of such view; in connection with action by him it is conclusive, estopping appellant from changing its attitude to his prejudice. It is elementary that silence of one person to a transaction by him with another, when he, acting in the ordinary way, would deny the claim of such other as to the character of such trans-

action, constitutes circumstantial evidence in favor of such other as to such character upon its subsequently being called in question between the parties. *Hinton v. Wells,* 45 Wis. 268; *Murphey v. Gates,* 81 Wis. 370, 51 N. W. 573. And such silence, naturally calculated to cause such other to occupy a position which he otherwise would not, upon his acting in the matter so that he would be prejudiced if such person were permitted to change his attitude with effect, becomes conclusive evidence of what such silence suggests, estopping such person from asserting that which, if asserted in the first instance, would or might have deterred such other from advancing to where retreat would be prejudicial to him. *Mygatt v. Tarbell,* 85 Wis. 457, 55 N. W. 1031; *Wheeler & W. Mfg. Co. v. Monahan,* 63 Wis. 198, 23 N. W. 109; *Budge v. Mott,* 47 Wis. 611, 3 N. W. 381; *Smith v. Armstrong,* 24 Wis. 446. On the whole case we can see no good ground for disturbing the judgment appealed from.

By the Court.—The judgment is affirmed.

De Wolf, Appellant, vs. Washington, Respondent.

October 22—November 17, 1903.

Contracts: Consideration: Procuring insurance policies: Invalidity: Other insurance: Breach of warranty: Pleading: Estoppel.

1. Defendant requested plaintiff, an insurance agent, to procure fire insurance to a certain amount. Plaintiff procured and delivered two policies, in different companies, aggregating that amount, and defendant promised to pay plaintiff the premiums. Each policy (in the Wisconsin standard form) provided that it should be void in case of other insurance. *Held,* that if such policies when delivered were void as insurance contracts, each because of the other, they were binding agreements to pay to defendant the amount of the premiums on proper demand (sec. 1941—52, Stats. 1898), and hence were a sufficient consideration to support defendant's promise.

2. In an action upon such promise defendant could take advantage of the invalidity of the policies as a breach of warranty, only by pleading such breach affirmatively by way of setoff or counterclaim.

[3. Whether, where two insurance companies issue policies upon the same property, at the same time, and through the same agent, each policy providing that it shall be void in case of other insurance, the companies, by accepting the premiums with knowledge, through said agent, of the facts, estop themselves to deny the validity of the policies, not determined.]

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Plaintiff, an insurance agent, was requested by defendant to procure insurance of $7,000, in his discretion as to the companies. He procured and delivered two insurance policies, each for $3,000, upon defendant's residence, one being for $1,000 in addition upon a separate office building. Defendant agreed to pay plaintiff the premiums, amounting to $84. The policies were the Wisconsin standard form, each containing the provision that, unless otherwise provided by agreement indorsed thereon or added thereto, it "shall be void if the assured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." No such agreement was indorsed or added to either. Defendant made no objection to the policies until December 11, 1902, some three months after their delivery, when, upon request for payment of the premiums by plaintiff, he returned them, denying that he had ordered them, whereupon they were surrendered to the company, and the amount of short-time insurance for the three months deducted, and the balance, $67.20, repaid to the plaintiff, who credited it against the $84. This action was brought to recover the balance, $16.80. The court found the facts above stated, and concluded as law that both policies were wholly void from their date, and defendant not liable to the plaintiff for the premiums. Ac-

cordingly, judgment for the defendant was rendered, from which the plaintiff brings this appeal.

For the appellant there was a brief by *Roemer & Aarons,* and oral argument by *C. L. Aarons.*

William H. White, for the respondent.

DODGE, J. The trial court has found as fact that defendant ordered and received the policies in question and promised to pay plaintiff the premiums. To this must be added the assumption that defendant knew and understood that the policies must be obtained from some insurance companies and that plaintiff must pay the premiums to such companies. From the facts thus found there obviously results *prima facie* a liability of defendant to plaintiff in the amount of the premiums. What is there to avert such result? Respondent answers, the fact that the policies were void. But does such fact relieve from liability? Certainly not, unless by reason of that fact the consideration for defendant's promise failed. Either injury to the promisee or benefit to the promisor is good consideration to support a promise. That plaintiff suffers injury by parting with his money to the companies is certain. That defendant gained some benefit is also clear, for, if the policies were entirely void as insurance contracts, they constituted binding agreements on the part of the companies to pay to the defendant the amount of the premiums, on proper demand. Sec. 1941—52, Stats. 1898. We must conclude therefore that consideration did not entirely fail, and that, but for some other defense, the plaintiff was entitled to recover on defendant's promise. The only other defense possible is breach of warranty. If the policies were not such as contracted for, defendant had several courses open to him. He might have refused to receive the policies; he might have returned them as not satisfying the contract, unless his conduct had been such as to constitute an acceptance of them; or he might retain them for what they were worth,

and set off or recoup damages. He did neither the first nor the second, for his return of the policies was not on the ground that they did not satisfy the contract, but upon the claim that no contract was made, now found to be false. The third course, which was his only alternative, he must be deemed to have elected. That, however, could constitute defense, either in whole or in part, only by pleading a breach of warranty affirmatively by way of setoff or counterclaim, of which nothing appears in the record. Upon the pleadings and the facts found, therefore, the plaintiff was entitled to judgment.

This conclusion renders unnecessary the consideration of the question discussed by counsel whether the two policies, delivered at the same time, with full knowledge in the agent and therefore in the companies (sec. 1941—62, Stats. 1898), could be repudiated by those companies on that ground; whether, in other words, the companies did not, by issuing the policies and accepting the premiums, with such knowledge, estop themselves from denying the validity of their acts.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in favor of plaintiff for $16.80, with interest from December 11, 1902.

SAXE and others, Appellants, vs. SAXE and another, Respondents.

October 22—November 17, 1903.

Executors: Objections to person named: Mandatory statute.

Sec. 3792, Stats. 1898, providing that "when a will shall have been duly proved and allowed, the county court shall issue letters testamentary thereon to the person named executor

therein, if he is legally competent," etc., is mandatory; and objections going merely to the temper, disposition, habits, and moral character of the person named, rendering him obnoxious to parties interested in the estate, will not justify the court in disregarding the expressed wish of the testator. *Estate of Pike*, 45 Wis. 391, distinguished.

APPEAL from a judgment of the circuit court for Milwaukee county: JAMES O'NEILL, Judge. *Affirmed.*

Louis Saxe executed his last will and testament January 6, 1894. He died September 9, 1900. On September 12, 1900, *Leo E. Saxe* and Thomas J. Pereles, named as executors in the will, petitioned the county court for the probate of the will and for letters testamentary to be granted thereon according to law. On November 5, 1900, the widow and ten of the children of the deceased (being all except one and *Leo E. Saxe*) appeared and objected in writing to the appointment of *Leo E. Saxe* as such executor for the reasons that he was incompetent and irresponsible; that he would be obnoxious, and would not act for the benefit and interest of the persons interested in the estate; and that he was not of such a character in whom confidence and trust could be imposed. Afterwards, on November 13, 1900, the will was admitted to probate. On May 28, 1901, the county court entered an order overruling and setting aside such objections and appointed *Leo E. Saxe* as one of such executors, and thereupon, on the same day, *Leo E. Saxe* accepted such trust and qualified as such executor and duly filed the bond required of him by law and the order of the county court, and letters testamentary were thereupon issued to him.

Thereupon an appeal was taken from such order and judgment of the county court so appointing *Leo E. Saxe* as such executor to the circuit court, wherein, after due notice, the cause was retried, and at the close of the trial that court found, in addition to the facts stated, in effect, that at the time of the probate of the will and issuing of letters testa-

mentary thereon to *Leo E. Saxe* he was legally competent to act as such executor; that some years before *Leo E. Saxe* gambled at times, but the nature of such gambling was not disclosed by the evidence, and it was not proved that he was ever an habitual or professional gambler; that the evidence tended to throw suspicion upon the good faith of some of the business transactions of *Leo E. Saxe* in previous years, but was not sufficient to prove actual fraud and dishonesty on his part; that the evidence failed to sustain the objections filed to his appointment as such executor, except in the particular that he was obnoxious to the heirs who filed such objections. And as conclusions of law the court found, in effect, that *Leo E. Saxe,* at the time of the death of the testator and the probate of the will, was, and still is at the present time, legally competent to act as such executor of said last will and testament, and was entitled to the issuance of letters testamentary to him as such executor; that *Leo E. Saxe* was entitled to judgment affirming the order of the county court in said matter, and therein directed the case to be remitted to the county court for further proceedings as provided by law; that *Leo E. Saxe* was and is entitled to recover his costs and disbursements on such appeal from the appellants, and ordered judgment to be entered accordingly. From the judgment so entered the plaintiffs appeal.

For the appellants there was a brief by *Nath. Pereles & Sons,* attorneys, and *James G. Flanders,* of counsel, and oral argument by *F. H. Remington* and *G. D. Goff.*

For the respondent *Leo E. Saxe* there was a brief by *Fiebing & Killilea* and *Howard Van Wyck,* and oral argument by *Mr. Van Wyck.*

CASSODAY, C. J. By stipulation of the parties the case was retried in the circuit court upon the evidence taken in the county court. Such testimony was voluminous. The view

we have taken of the case, however, renders it unnecessary to discuss the evidence in detail. The statute declares:

"When a will shall have been duly proved and allowed the county court *shall* issue letters testamentary thereon to the person named executor therein, *if he is legally competent* and shall accept the trust and give bond as required by law." Sec. 3792, Stats. 1898.

Upon the will being admitted to probate, and *Leo E. Saxe*, named as executor therein, having been appointed as such, he immediately accepted the trust and gave bond as required by law and the order of the county court. This being so, the important question is as to the effect to be given to the language of the section which declares that "the county court *shall* issue letters testamentary . . . to the person named executor therein, *if he is legally competent.*" Both the county court and the circuit court found as a matter of fact and as a conclusion of law that *Leo E. Saxe* was legally competent to act as such executor. The findings of the court are amply supported by the evidence. There is no claim that he was wanting in mental capacity to perform the duties of executor. The objection that he was irresponsible seems to be answered by his promptly giving the requisite bond. The other objections are to the effect that he abused his stepmother, was obnoxious to the objecting heirs, and that his character was not such as to inspire confidence and trust. The objections go to his temper, his disposition, his habits, and his moral character, rather than to his capacity to do business. Are such objections available to set aside the expressed wish of the testator? A recent work declares that:

"An executor, according to the common-law doctrine, derives his office solely from the will by which he is appointed, and not from the probate, which is held to be only evidence of his right. In many, if not all, of the states of the Union the authority of an executor, while derived primarily from the will, is not derived solely therefrom, and is not complete until the executor has qualified by complying with certain

statutory requirements, and has received letters testamentary from a court of competent jurisdiction; but the *nomination* contained in the will *cannot be disregarded by the court* unless the person named is for some reason disqualified to act as executor, and the authority of the court in the premises is limited to qualifying the executor and issuing letters testamentary, and does not extend to the appointment, as that authority pertains to the testator alone." 11 Am. & Eng. Ency. of Law (2d ed.) 744, 745, cited approvingly in *Somervaill's Will,* 104 Wis. 72, 74, 80 N. W. 65.

To the same effect, Schouler, Ex. & Adm. (2d ed.) § 33. Such rule is amply supported by authority. Thus it was long ago held in Kentucky that:

"Moral fitness of person appointed executor by will cannot be inquired into by the court to which he applies for permission to qualify. Executor derives his office from testamentary appointment, and, if he is a person not disqualified by law from being an executor, the court has no right to refuse to permit him to qualify, or to refuse to grant him letters testamentary." *Berry v. Hamilton,* 12 B. Mon. 191, 54 Am. Dec. 515; *Holbrook v. Head,* 9 Ky. Law Rep. 755, 6 S. W. 592; *Worthington v. Worthington's Ex'r,* 18 Ky. Law Rep. 62, 35 S. W. 113.

So it has been held in Connecticut that:

"The rule of the common law as to who might be executors was that all persons might be who were mentally capable of executing the trust, or were not specially disqualified. Where a testator appoints an executor out of the class recognized by the common law or by statute as capable, the probate court cannot reject the person so appointed, except in cases where the law has specially so provided." *Smith's Appeal,* 61 Conn. 420, 24 Atl. 273.

In New York it has been held that, "to render one incompetent to serve as executor, . . . it is not sufficient to show that he has an ill-regulated temper, lacks self-control, and is accustomed to use abusive language toward those named as co-executors." *McGregor v. McGregor,* 3 Abb. Dec. 92; *Emerson v. Bowers,* 14 N. Y. 449. So it was held in Pennsylvania

many years ago that "a person found by inquisition to be an habitual drunkard is not thereby deprived of his power to perform the office of executor or administrator." *Sill v. M'Knight,* 7 Watts & S. 244. See *Holladay v. Holladay,* 16 Oreg. 147, 19 Pac. 81. The direction of the testator in naming his executor is not to be disregarded except as prescribed by statute. This court has recently reversed a case for failure to follow the direction of the testator in the appointment of a person to fill a vacancy as trustee. *Cole v. Watertown, ante,* p. 133, 96 N. W. 538.

Counsel for the appellants cite *Estate of Pike,* 45 Wis. 391. That was a proceeding to remove an executor under a statute now embraced in sec. 3803, Stats. 1898. Such statute expressly authorized the county court to remove an executor who should "neglect, after due notice given by the county court, to render his account and settle the estate according to law, or to perform any judgment of the court," or who should "abscond, or become insane, or otherwise incapable or unsuitable to discharge the trust" imposed upon him. It will be observed that the several things which may thus authorize removal are all such as occur after he is appointed. It is enough to say that the case at bar does not come within the provisions of that section.

We must hold that *Leo E. Saxe* was legally competent to act as such executor within the meaning of sec. 3792, Stats. 1898, and hence that that statute was mandatory and required the county court to give effect to the expressed wish of the testator by appointing him as such executor.

By the Court.—The judgment of the circuit court is affirmed.

HOLZ, Respondent, vs. REDISKE, Appellant.

October 22—November 17, 1903.

Justices' courts: Lost jurisdiction: Subsequent voluntary appearance: Appeal: Questions considered.

1. **A justice lost jurisdiction by an unauthorized adjournment. On the adjourned day defendant, who had been subpœnaed as a witness, failed to appear, and was arrested and brought into court by attachment. After showing these facts, the justice's docket states that defendant "now appears and asks that this cause be continued until," etc.; that the motion was granted; and that "by consent of the parties" the action was adjourned accordingly. *Held*, that defendant's appearance was voluntary, and the justice thereby regained jurisdiction.**
2. **An objection to the jurisdiction of a justice, not alleged in the petition to the circuit court for a writ of *certiorari*, but urged for the first time on appeal from the circuit court to this court, will not be considered.**

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This is an action of *certiorari* brought to reverse the judgment of a justice of the peace. Return to the writ was made by the justice, and it appeared therefrom that *Rediske* sued *Holz* in a tort action before the justice, and obtained an order of arrest September 25, 1900; that *Holz* was arrested, and appeared in court September 29, 1900, when issue was joined in the action and the same was adjourned until October 6, 1900, *Holz* giving his own recognizance to appear in court *September 6,* 1900, and "answer to a criminal prosecution for . . . ." On October 6th the parties appeared, a jury trial was demanded by *Holz,* the jury selected, venire issued, and the case adjourned by consent to October 12th. A like adjournment was had on the 12th to the 19th, and on the 19th to the 26th of October. On the 26th of October both parties appeared personally, and *Rediske* asked for an ad-

journment because his lawyer could not be present, which motion was granted and the case adjourned to the 2d day of November. November 1st a subpœna was issued at the request of *Rediske* for *Holz,* returnable on the following day. November 2d *Rediske* appeared, but *Holz* did not. Proof was made of due service of the subpœna on *Holz,* and that he was a material witness and refused to attend, and an attachment was issued to the constable for his arrest. The attachment was returned by the officer, his return stating that he had arrested *Holz* and had him now in custody in court. The docket then proceeds as follows:

"Plaintiff is ready for trial. The defendant, *Frederick Holz,* now appears in person, and asks that this cause be continued until the 8th day of November, 1900, at 2 o'clock p. m. of that day. Motion granted, and by consent of the parties this action is adjourned until the 8th day of November, 1900, at 2 o'clock in the afternoon, at this, my office."

November 8, 1900, the case was called, and *Holz* did not appear, whereupon the court proceeded to try the case without a jury, and rendered judgment for the plaintiff for damages and costs. Upon the record the circuit court reversed the judgment of the justice, and *Rediske* appeals.

For the appellant there was a brief by *Doerfler, McElroy & Eschweiler,* and oral argument by *F. C. Eschweiler.*

J. E. Wildish, for the respondent.

WINSLOW, J. The sole question is whether the record of the justice shows that the judgment of the justice was rendered without jurisdiction. That he lost jurisdiction by the adjournment of October 26th is *res adjudicata* as between these parties. *Holz v. Rediske,* 116 Wis. 353, 92 N. W. 1105. The question is whether the docket shows that jurisdiction was regained by the appearance of *Holz* on the 2d of November. If this appearance was voluntary, jurisdiction was regained; if involuntary, it was not regained. *Brosde*

v. Sanderson, 86 Wis. 368, 57 N. W. 49. *Holz* had given no bond for his appearance on the last-named day, hence the principle laid down in the last-named case does not apply; but it is claimed that, because he had been arrested and brought into court by attachment, his subsequent appearance must be considered involuntary. If it appeared that his entry into court under arrest was the sole fact upon which the entry of his appearance was predicated, this position would doubtless be correct; but the justice's docket, which must be taken as true, does not, in our judgment, show this fact. It is true that it shows that *Holz* was arrested and brought into court, but it then states that he appeared in the action and asked for a continuance, which was granted. There is nothing which shows that either the appearance or motion for continuance was coerced. On the contrary, the only reasonable inference from the statements of the docket is that they were voluntary acts. The fact that *Holz* was under arrest did not prevent him from voluntarily appearing if he chose to do so. It must therefore be held that the docket shows that jurisdiction was regained by the voluntary appearance.

It is said that jurisdiction was lost by reason of the failure to try the case by jury after demand had been made for the jury trial, but, as this ground was not alleged in the petition for the writ and is urged for the first time in this court, it will not be considered.

By the Court.—Judgment reversed, and action remanded with directions to affirm the judgment of the justice.

IN RE STREIFF.

October 23—November 17, 1903.

Guardians: Appointment: Statute construed: Mental incompetency: Evidence.

1. The power to appoint a guardian for an adult person depends upon the statute, and unless the requisites thereof are shown to exist the court cannot act favorably in the matter, though satisfied that the subject for whom the guardian is sought is not capable of caring for his property judiciously.
2. It is not essential to the appointment of a guardian in the case above suggested, that the person be held to be either insane or an imbecile in the technical sense of those terms.
3. In statutory requisites for the appointment of a guardian for an adult person, insanity is one cause and mental incompetency by reason of old age or other cause, to have the charge and management of property, another.
4. Mental incompetency to have the care and management of property, within the meaning of the statute, means mental incapability in that regard.
5. The mental incapability above mentioned should be substantially total. That is, it should be equivalent, substantially, to insanity or imbecility as regards ability to manage and care for property, it being recognized, however, that such condition may exist and the sufferer be neither an idiot nor insane.
6. In an application for the appointment of a guardian for a very old person, proof that such person is so mentally and physically infirm as to have no effective physical and will power to care for himself; that he is dependent daily upon the attention of others who reside with him in his own home; that such others not only do not render proper attention, but so conduct themselves as to intensify the sufferer's condition; that such sufferer is not physically or mentally able to either protect himself where situated or emancipate himself therefrom; that his condition is such as to render him susceptible to undue influence in respect to parting with his property; and that such influence has been used by the persons having opportunity in that regard, resulting in his parting with his property to them without consideration—are all material evidentiary facts bearing on the ultimate issue to be solved.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Milwaukee county: E. B. BELDEN, Judge. *Affirmed.*

The appeal is from a judgment in proceedings for the appointment of a guardian. The cause was tried in the circuit court on appeal from the decision of the county court granting the prayer of the petitioner. The nature of the proceedings, the issues involved, and the evidentiary facts deemed by the court sufficient to warrant the appointment of a guardian for the alleged incompetent, are indicated by the findings, which are in substance as follows:

(1) *Martha Streiff,* the alleged incompetent, is about eighty-five years of age.

(2) She has property in the city of Milwaukee upon which she resides, of the value of about $9,000, which she has owned about thirty-eight years.

(3) Her heirs at law are Henry Streiff, her son, and *Emma* and Albert Fink, her grandchildren.

(4) Her son is a man of weak mind. His family consists of a wife, Agnes Streiff, and two children. During the married life of Henry and Agnes, covering a period of about twenty years, they have resided with *Martha* upon her property and have been mostly supported by the income therefrom. They have done nothing whatever to contribute to the support of *Martha,* or paid her anything for the use of her property.

(5) The said grandchildren, for twenty years, have been accustomed to visit *Martha* and pay her loving attention. Recently they have been prohibited by Henry's wife from seeing her.

(6) Henry's wife is a strong-minded woman of violent temper. She has been accustomed to use abusive language to *Martha* and to otherwise illtreat her, keeping her in a state of fear and subjection, and causing her, for a long period of time, much suffering. Such illtreatment has increased in

severity since June 26, 1901, the time when Henry and his wife acquired, without consideration, all of *Martha's* property as hereafter stated.

(7) *Martha* is weak in mind and physically infirm. Her physical infirmities render her incapable of leaving her home. She has been blind for a considerable period of time. She is now living in a state of fear, and under the subjection, of Henry's wife.

(8) June 26, 1901, at the request of Henry's wife, and without consideration except the nominal one of a dollar, she transferred all her property to the former and her husband, leaving herself wholly dependent upon their pleasure for support.

(9) She is mentally incompetent to have the charge and management of her property, and incapable of taking care of herself.

The conclusion of law from the foregoing was that the petition for the appointment of a guardian for *Martha* was properly granted by the county court, and that judgment to that effect should be rendered. A judgment of affirmance was accordingly entered, from which this appeal was taken.

For the appellant there was a brief by *Nath. Pereles & Sons,* and oral argument by *G. D. Goff.* To the point that mere mental weakness will not justify the appointment of a guardian, they cited *Armstrong v. Short,* 1 Hawks (N. C.) 11; *Ex parte Cranmer,* 12 Ves. Jr. 445; *In re Holmes,* 4 Russ. 182; *Comm. v. Reeves,* 140 Pa. St. 258; *In re Collins,* 18 N. J. Eq. 253; *Schick v. Stuhr* (Iowa) 94 N. W. 915.

For the respondent there was a brief by *Kronshage & McGovern,* attorneys, and *W. S. Frazier,* of counsel, and oral argument by *F. E. McGovern* and *W. S. Frazier.*

MARSHALL, J. The main contentions of appellant's counsel are, that the evidence introduced, of which there was much, as to undue influence by Henry Streiff and his wife

to obtain from appellant the deed of her property, and the evidence showing illtreatment of appellant, was incompetent; that such evidence had no bearing on the real subject for investigation,—the mental competency of Martha to have the charge and management of her property; that the findings of fact based specifically thereon are immaterial to the real subject of inquiry and should not and would not have been made but for the admission of such incompetent evidence; and that such findings were the real basis for the ultimate conclusion of fact that *Martha Streiff* was mentally incompetent as alleged in the petition.

We are unable to agree with counsel. That *Martha Streiff*, by reason of mental weakness produced by old age and her infirmities, required tender care from others at all times; that those with whom she resided, because of her broken-down condition, were able to keep her in a state of subjection to their will; that they exercised their power in that regard; that they kept her relatives from her and illtreated her in many ways; that she was too weak and infirm to protect herself therefrom; that they obtained from her all of her property without consideration and then increased the severity of their treatment; and that she was mentally and physically powerless to resist such treatment or to escape from it,—bore very strongly upon the ultimate issue of fact to be solved,—whether she was, by reason of extreme old age or other cause, mentally incompetent to have the charge and management of her property. Sec. 3976, Stats. 1898. Certainly, evidence showing that she was incapable of protecting herself in any way from the abuse of others in her own home, and that she was controlled by the will of others in giving them all her property, leaving her without any means of support in her old age, there being nothing in the conduct of such others that would influence one so circumstanced, capable of acting with any degree of prudence, to rely upon mere moral obligations to secure in return for the property some reasonable equiva-

lent in care and attention, may well be viewed, as the trial court evidently deemed the same, as strongly indicating mental incompetence to have the charge and management of her property.

True, as suggested by appellant's counsel, the power to appoint a guardian in the circumstances of this case depends upon the statute. Unless the statutory conditions requisite to the exercise of such power are shown to exist by the evidence the court is powerless to act, however clear it may appear by proof that the subject for whom a guardian is sought is not capable of caring for his property judiciously. But such conditions do not call for imbecility or insanity in a technical sense. It is sufficient if the subject is as incapable of managing his affairs as if he were insane. That is plain. Our statute should not be confused with those which are worded differently, and the decisions under the same. The term "mentally incompetent to have the charge and management of his property" means mental incapability to do so. *In re Leonard's Estate,* 95 Mich. 295, 54 N. W. 1082. True, the incapability must be, as before indicated, substantially total, as in case of imbecility or insanity; not that partial incapability often seen in persons so intellectually weak that they are capable of managing their affairs with very little judgment. Nevertheless, the subject need not be necessarily classed as either insane or an idiot in the ordinary meaning of those terms. Counsel cite *In re Storick,* 64 Mich. 685, 31 N. W. 582, construing the Michigan statute, which is like our own, as holding that it calls for insanity or imbecility. The language of the court in that case is, "insanity or mental infirmity that is equivalent in destroying mental competency." By that it is seen that the court viewed mental incompetency from any cause rendering a person as incapable of managing his property as if he were insane, covered by the statute. In short, that mental incapability of one to manage his property, as distinguished from insanity in the ordi-

nary sense, gives the court jurisdiction to appoint a guardian, as held in the later case. *In re Leonard's Estate, supra.*

In the earlier decisions of courts, particularly the English decisions, the mooted question was whether a court of chancery possessed jurisdiction to appoint a guardian of a person in the absence of a finding that such person was insane or an idiot. A good review of such cases is contained in the opinion in *In re Barker,* 2 Johns. Ch. 232. The position finally taken by the English courts and the one which the New York court adopted is indicated in the following, quoted from the chancellor's opinion:

"Lord ELDON, in *Ridgeway v. Darwin,* 8 Ves. Jr. 65, observed that in Lord HARDWICKE's time commissions of lunacy were not granted to the extent in which they have been since granted. That when he came into the court, he found a course of cases establishing its authority where the party was not absolutely insane, but was unable to act with any proper and provident management, and was liable to be robbed by any one, under that imbecility of mind, calling for as much protection as absolute insanity. When the mind was worn out by years, or epilepsy, or habitual intoxication, etc., the party required that care should be thrown around him."

That view is embodied in many, we may say most, of the modern statutes. The words "lunacy" and "unsound mind" have been bent out of their technical sense in some instances, a legislative construction being given thereto in harmony with the broad views of courts to which we have alluded, that they include every phase of unsound mind rendering one incapable of caring for himself or his property (1 Birdseye's Rev. Stats. N. Y. 1889, p. 512); that it includes mental unsoundness rendering the sufferer incapable of managing his property (Rev. Stats. Mo. 1899, sec. 3702). In many statutes, of which that of Michigan and our own are instances, the term "insanity," considered in its technical sense, is separated from its equivalent as regards the ability of the sufferer to care for himself or his property, leaving no ground

to claim that mental unsoundness, meaning insanity strictly so called, is essential to the appointment of a guardian. The statute provides for the guardianship of insane persons and any others who, "by reason of extreme old age or other cause, are mentally incompetent [that is, incapable] to have the charge and management of their property."

True, the evidence in this case does not show that *Martha Streiff* was insane or an imbecile in the technical sense of those terms; but it pretty clearly shows that she might as well be either the one or the other as regards capability to have the charge and management of her property. That satisfies, clearly, the very letter of the statute. The evidentiary facts found, which are well supported by the proof, show, as before indicated, that appellant was so weak of mind as to submit to the will of others to the extent of parting with all she possessed without making any provision whatever for her future support, notwithstanding her utterly helpless condition. It shows that she had neither will power to assert her rights in her own home, nor to disassociate herself from her surroundings and obtain the assistance and care of others. It shows that she was in her second childhood, and in nearly the last and most helpless stage thereof. It shows that she was as much in need of care and protection as an infant, and that those under whose control she was living neither extended that care to her nor permitted others to do so or to comfort her in any way, but took advantage of her weakness and their relations to her to practically rob her. That is what the evidence strongly tends to prove. It is what the court found in effect. If the court has not power under our statute to rescue an old person from such a situation, it is a severe criticism upon the wisdom of the lawmaking power; but there has been no legislative neglect in that regard, as we have seen, in that the statute expressly provides for just such cases as this,—for persons who, from extreme old age or other cause, are mentally incompetent to manage their property. Thus

has become written law the reasoning of courts of which that found in *Ridgeway v. Darwin,* 8 Ves. Jr. 65, is a fair type, where the chancellor said, in effect: The question is not necessarily whether the person is absolutely insane; it is sufficient if he is unable to act with any proper and provident management, and is liable to be robbed by any one, calling for as much protection as absolute insanity. And that in *Ex parte Cranmer,* 12 Ves. Jr. 445, where Lord ERSKINE said, that it is unseemly that a person whose faculties have become so decayed by old age that he is unfit to govern himself or his affairs, cannot have the protection of a guardian except that he be put upon the footing of a lunatic. Why should not a man be entitled to protection in his second state of infancy as well as the first?

By the Court.—The judgment is affirmed.

LIPPINCOTT and others, Appellants, vs. LAWRIE, imp., Respondent.

October 23—November 17, 1903.

Mortgages: Variance by parol: Collateral security: Prospective indebtedness: Appeal: Examination of evidence rejected by trial court: Direction of judgment.

1. Parol evidence is admissible to contradict the absolute terms of a note and mortgage by showing that they were not given for a debt then existing, but merely as collateral security, and to describe or define the undertaking or liability to which they are collateral.
2. Thus, in this case, parol evidence was admissible to show that a note and mortgage for $3,000 were given as security for any balance which might thereafter be due from the mortgagor, not only for goods purchased up to said amount, but also as continuing security for goods purchased beyond that amount—the liability on the instruments themselves, however, not to exceed $3,000.

3. Where evidence as to a controlling fact was all received by the trial court and appears in the bill of exceptions, although, after being received, it was stricken out as inadmissible by the trial court, which accordingly held that there was no evidence to show such fact, this court, upon holding such evidence admissible, will examine it and, if it establishes said fact with reasonable certainty, will so decide and will direct the trial court to act in accordance with that decision, especially where there is no probability that the evidence would be different upon a retrial.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

On September 20, 1897, one D. J. Lawrie, the husband of respondent, *Mertie Lawrie,* was a tailor in Milwaukee, and had for some time before been purchasing cloths of the plaintiffs. He desired to so continue, and they declined to allow such line of credit as he had theretofore enjoyed unless some security were given. It was proposed and arranged that he and his wife should give a note and mortgage for $3,000 as security for prospective indebtedness. Plaintiffs' agent came to Milwaukee, and had a meeting with D. J. and *Mertie Lawrie* in the presence of an attorney, at which was executed an ordinary promissory note for $3,000, running three years, with privilege of payment at any time in sums not less than $100, payable to the attorney, who immediately made an assignment to the plaintiffs. During the ensuing year and a half, D. J. Lawrie purchased goods to the amount of about $4,800, and from time to time made payments thereon, in the total aggregating about $2,300, leaving unpaid about $700 of the first $3,000 worth of goods and about $2,500 of total indebtedness. He then became bankrupt. Evidence was given as to the agreement of the parties, had at the time of the execution of the note and mortgage, to the effect that the same were to stand as a running security for any balance which might become due from D. J. Lawrie to the plaintiffs. The court admitted the evidence to the extent of

proving that the only liability upon that note and mortgage was for goods to be purchased, but excluded the evidence that it was to be a continuing security for any goods beyond the first $3,000, on the stated theory that such evidence tended to vary the terms of the written agreement. He accordingly held that there was no evidence to prove liability in excess of the approximately $700 remaining unpaid out of the first $3,000, and rendered judgment for that amount, refusing judgment for the remaining $1,800. From that judgment the plaintiffs bring this appeal.

F. A. Geiger, for the appellants.

For the respondent there was a brief by *Timlin & Glicksman,* and oral argument by *Nathan Glicksman.*

DODGE, J. When the trial court ruled that parol evidence might be admitted to show that the absolute acknowledgment of the existence of a debt of $3,000, and the promise to pay the same, expressed by the note and mortgage in suit, were not to be taken according to their words, but that said papers, absolute in form, were given and received merely as collateral security for some other liability, he ruled rightly. 2 Jones, Ev. § 507; *Kent v. Agard,* 24 Wis. 378; *Andrews v. Jenkins,* 39 Wis. 476, 481; *Manufacturers' Bank v. Rugee,* 59 Wis. 221, 223, 18 N. W. 251; *Lamson v. Moffat,* 61 Wis. 153, 156, 21 N. W. 62; *Gettelman v. Commercial U. A. Co.* 97 Wis. 237, 241, 72 N. W. 627; *Nauman v. Ullman,* 102 Wis. 92, 78 N. W. 159; *Brader v. Brader,* 110 Wis. 423, 431, 85 N. W. 681; *Bank of Utica v. Finch,* 3 Barb. Ch. 293; *Ferris v. Hard,* 135 N. Y. 354, 32 N. E. 129; *Kaphan v. Ryan,* 16 S. C. 352; *Davis v. Crookston W. P. & L. Co.* 57 Minn. 402, 59 N. W. 482.

These authorities establish that an absolute written conveyance of property or an absolute written promise to pay a specified sum may be varied or contradicted by parol to the extent of showing that each is a collateral security merely,

since that amounts merely to proving the whole agreement, of which the writing purports to be only a part. As a corollary it is, of course, true that such evidence is receivable to describe and define the undertaking or liability to which such writing stands as collateral. In this case there were but two witnesses who testified that the note and mortgage sued on were given as collateral at all, and they testified that they were given and received as security for any balance which might at any time exist upon an anticipated running account between plaintiffs, as wholesalers, and Daniel J. Lawrie, as purchaser of goods. The trial court held that evidence of such fact could not be received, because it varied the terms of the writings, and then found that the note and mortgage were given as security for the indebtedness of Daniel J. Lawrie for the first $3,000 worth of goods he should buy of plaintiffs—an agreement to which no witness testified. It should be noted that the only other witness to the transaction—the respondent herself—testified that nothing was said in her presence to indicate that the note and mortgage were other than they appeared on their face, namely, an absolute promise by D. J. Lawrie and herself to pay plaintiffs the full sum of $3,000 for a consideration already received.

The attitude of the court is obviously untenable. Either the instruments sued on must be varied in their legal effect in accordance with the parol agreement in fact made by the parties, or they cannot be varied at all. They are either enforceable according to their terms for the full amount of $3,000, or their enforceability is limited to that less amount which the evidence shows the parties agreed to. The ruling was, in effect, that the parties might show that the note and mortgage were given as collateral, but could not show to what they were so collateral. It no more varied the writing to show that the papers were collateral to one undertaking than to another. Any such proof, of course, had effect to vary and modify the writings, but in a permitted respect, as

shown by the above-cited authorities, so long, of course, as no attempt was made to establish a liability on the writings greater than $3,000, their face. *Bank of Utica v. Finch, supra.* The variance so provable was in either event favorable to defendant, not to plaintiffs. It tended to curtail the otherwise absolute liability for their face established by the papers themselves. The court carried that curtailment far beyond any warranted by the rejected evidence, and did so merely by excluding evidence of what the parol agreement really was. In this, palpable error was committed, which must necessitate reversal.

That result being inevitable, the next question presented for solution is upon the direction to be given the trial court. On the question of fact whether the agreement of the parties was that the note and mortgage in question should stand as continuing security for the balance of the merchandise account between plaintiffs and Daniel J. Lawrie, there is no finding. The court having rejected all evidence tending to sustain the affirmative, he thereupon limited his finding to the assertion that there was no evidence to support it. The evidence, however, was all received, though afterwards stricken out, and is all included in the bill of exceptions. The trial court has merely declined to pass upon its credibility, weight, and sufficiency to establish the fact testified to. In that situation, the duty of this court is declared in *Brown v. Griswold,* 109 Wis. 275, 280, 85 N. W. 363, as follows:

"If the evidence clearly supports the judgment, we should affirm it. . . . Failing this, if the question is in doubt and uncertain, so that a decision here might work injustice, we should reverse and remand for further trial. . . . But if an examination of the evidence discloses with reasonable certainty a preponderance in favor of the plaintiff's contention, it is our duty to direct judgment in accordance therewith."

An examination of the evidence on the subject discloses positive, direct, and intelligent testimony by the attorney

who drew the papers, and by the agent of the plaintiffs who made the bargain, that it was agreed with D. J. Lawrie, in the presence of his wife, that this note and mortgage should stand as a continuing security for any balance of account; that it was given for a term of three years, although it was understood that he was likely to need as much as or more than $3,000 worth of goods in the first year; and that it was given in the hope and expectation of his permanent continuance in business and ability to establish himself in easy circumstances if granted reasonable lines of credit. This purpose, so testified to, is further confirmed by prior correspondence between the defendant D. J. Lawrie and the plaintiffs. No other witness than these two was sworn, except the defendant *Mertie Lawrie,* who did not deny that the agreement between Mr. Lawrie and the plaintiffs or the plaintiffs' agent was as stated, but merely denied that the making of that agreement and the conversation testified to by the other witnesses took place in her presence or hearing. Another item of evidence principally relied on by respondent is the original complaint, afterwards amended out of the case, but which was introduced in evidence. It is claimed that that complaint alleges merely that the note and mortgage were given to secure $3,000, price of goods to be sold by plaintiffs to D. J. Lawrie, and is therefore inconsistent with the present claim. It cannot be denied that the original complaint is open to such construction, but it is rendered ambiguous by the asserted claim that nevertheless the note and mortgage were given as security for the entire amount of the account now claimed. Another bit of evidence mentioned by the respondent is that the note provided that it might be paid in instalments of not less than $100 at any time before maturity, which she claims is inconsistent with the idea of a continuing $3,000 guaranty throughout the three years. The fact is at least indicated by the copy of the note attached to the pleadings that it was written upon a blank form, prob-

ably containing this not unusual provision for instalment payments, the significance of which is, of course, thereby diminished. The foregoing is substantially all the evidence introduced upon which the trial court should have acted. There is nothing inherent in the testimony of either the attorney or the agent of the plaintiffs to cast doubt upon it. They were both men of intelligence and business understanding, who clearly comprehended the distinction between such an agreement as that found by the court and such as that contended for by the plaintiffs. The situation also is quite adequately disclosed, and renders it highly improbable that the plaintiffs would have deemed satisfactory a security merely for the first $3,000 worth of goods as a justification for continued extension of credit. Much that is said in *Shores v. Doherty,* 65 Wis. 153, 26 N. W. 577, in construing the agreement there under consideration, is even more cogently applicable to the probabilities in the situation of these parties. The only negation of these witnesses of any significance is the so-called admission contained in the original complaint. Our conclusion is that while the drawing of that document tends to throw into some measure of doubt the testimony of Mr. Moss, the attorney, it cannot suffice to overcome the entirely positive and direct testimony of the agent who in fact made the agreement, and whose version is now confirmed by Mr. Moss, after having his attention and memory fully aroused to the antithetic theories thereof. If that so-called admission be not sufficient to overcome the direct testimony, then the conclusion is obvious that there is a clear preponderance of evidence in favor of the cause of action as stated by the plaintiffs; and it becomes our duty to so decide, and to direct the trial court to act in accordance with that decision, especially since there are no probabilities suggested by the record that other evidence would be obtainable upon a retrial, or that the respondent has been induced to forego the offer of any evidence by reason of the ruling of the trial

court. Such fact could not well exist, for the ruling was not made until both parties had rested.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment according to the prayer of the complaint.

ILLINOIS STEEL COMPANY, Respondent, vs. BUDZISZ and wife, Appellants.

October 23—November 17, 1903.

Adverse possession of land: Claim of title: Court and jury.

Upon evidence tending to show open, exclusive, continuous, uninterrupted, and hostile use and occupation of land for the statutory period by defendant and his grantors and predecessors, it is *held* that it was a question for the jury whether such occupation was under claim of title exclusive of any other right so as to constitute adverse possession.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

An action brought by respondent to recover a portion of lot No. 2 in block 193 of fractional section No. 33, town 7, range 22, situated in the city and county of Milwaukee. Respondent claims to own the absolute fee to the premises, and that it is entitled to the immediate possession thereof. The answer denies respondent's title to the premises, and alleges adverse possession thereof for a term of more than twenty years immediately preceding the commencement of this action. The action was commenced on the 20th day of June, 1897. It was agreed and stipulated that respondent has *prima facie* record title to the property described, and that defendants are in possession.

Upon the issue of the adverse possession, the evidence tended to show that Albert Herring took possession of the

premises in 1876, after purchase from one Thun; that a fence inclosed the premises, whereon was a house, which he occupied as his home until he sold it. In 1879 Herring sold whatever interest he had to Frank Socha, who testifies that he received the key to the house when he paid Herring for the property; that he bought everything from Herring; "I bought the house and the ground and the fence. I was in possession of it with my family;" that he made improvements on the premises, on the house, and by filling in the lot; that he was in possession continuously up to the time he sold it to Kriehn. As to the purchase and possession of the property by Kriehn, there is evidence tending to support the claim that he purchased it from Socha, who was occupying it as his home in 1883; that he paid him the consideration; that the elder Kriehn, father of the Kriehn mentioned in the testimony, made the bargain for the purchase from Socha for his son, who furnished the money; that another son moved into the house immediately after Socha moved out, and paid rent to the brother who had furnished the purchase money; that he occupied the house and premises within the inclosure for a time, and then moved out, when the brother who paid the purchase money moved in with his family, who occupied it and treated it as his own, living in it and keeping it as a home until 1885, when he offered to sell the ground, house and all, to Joseph Konkel, who bought it. Konkel took possession and occupied the whole premises, paid taxes thereon, lived on the property, made some improvements by filling depressions in the lot, and offered the whole premises for sale in 1893, and sold to August Budzisz. As to August Budzisz's possession, there is evidence tending to show that he moved in immediately after, occupied them for a year and a half, built a barn, made other improvements, and sold the property to the defendant *August Budzisz No. 3,* who claims that he was the owner and in possession of the premises when this action was commenced.

In addition to these facts, it appeared from the testimony that these respective occupants were reputed to be the owners of the property, and that their possession, use, and treatment of the property was visible and readily observed by all persons who had occasion to come in view of the premises; that it was inclosed by a fence throughout the whole period of such occupancy.

Upon respondent's motion, at the conclusion of the testimony the trial court directed a verdict in its favor, and awarded judgment in accordance therewith. This is an appeal from that judgment.

For the appellants there was a brief by *Fiebing & Killilea* and *M. C. Krause,* and oral argument by *O. J. Fiebing.*

For the respondent there was a brief by *Van Dyke & Van Dyke & Carter,* and oral argument by *W. E. Carter.* They contended, *inter alia,* that the elements necessary to constitute adverse possession are defined by the statute, and the facts showing compliance with those statutory requirements must be established by clear and satisfactory proof. *Sydnor v. Palmer,* 29 Wis. 226; *Illinois S. Co. v. Budzisz,* 106 Wis. 514. When the alleged adverse possession is not "founded upon any written instrument," judgment, or decree, it must be "under a claim of title exclusive of any other right."

SIEBECKER, J. An examination of the testimony satisfies us that the court erred in directing a verdict for respondent. There is no serious controversy but that the parties occupied the premises for the respective periods mentioned, and made sales and transfers of such interests as they had. Appellant's counsel contends that the use and possession of the premises as described and set forth by the witnesses furnishes good grounds for the jury to find that the entry was made under a claim of title exclusive of any other right, and that the possession was adverse, under the statute. This contention of the appellant upon the evidence in the case is sustained by

the ruling in *Allen v. Allen,* 58 Wis. 202, 16 N. W. 610, decided as early as 1883, where the court held:

"This view of the effect to be given to evidence of long-continued occupation and use of real estate by a person in the actual possession thereof, and using the same as an owner would ordinarily use the same, as proof of adverse possession under the statute, is, we think, the proper view, and is supported by the authorities"—citing a number of cases in different jurisdictions.

In this view, the evidence presents a clear case for determination by the jury whether there was a continued, exclusive, open, and hostile use of the premises by appellant and his grantors and predecessors.

It is insisted in behalf of respondent that the undisputed evidence shows that an interruption occurred within the twenty years immediately preceding the commencement of this action. This contention is made upon the grounds that the evidence in no way tends to show that the occupancy of Mr. Herring in 1876 and of Mr. Kriehn in 1883 was in continuation of their immediate predecessors in possession. Counsel argues that the evidence material to these questions will support but one conclusion, namely, that there was a break in the possession and occupancy. This view appears to us a strained and unnatural construction of the evidence. Keeping in mind the subject-matter of these transfers, and giving to the acts and conduct of the parties in dealing with such affairs reasonable and ordinary intent and significance, it becomes manifest that a jury would be justified in finding that the use and occupancy of these premises was uninterrupted for a period of twenty years before the commencement of this action.

It is furthermore asserted, however, that the verdict was properly directed, for the reason that the undisputed evidence is that Kriehn's possession was not "under a claim of title exclusive of any other right." This argument is based on the idea that he "made no claim whatever of title to or

ownership of the land, knew that it was not his, and never claimed or pretended that it was." An inspection of the evidence germane to this question leads us to the conclusion that the contention cannot prevail, under the doctrine of adverse possession established by the decisions. What is held to be a possession "under claim of title exclusive of any other right" has been discussed and determined by this court in different cases, from among which may be cited *Allen v. Allen,* 58 Wis. 202, 16 N. W. 610; *Chicago & N. W. R. Co. v. Groh,* 85 Wis. 641, 55 N. W. 714; *Lampman v. Van Alstyne,* 94 Wis. 417, 69 N. W. 171; *Illinois S. Co. v. Budzisz,* 106 Wis. 499, 82 N. W. 534; *Illinois S. Co. v. Bilot,* 109 Wis. 418, 84 N. W. 855; *Illinois S. Co. v. Jeka, ante,* p. 122, 95 N. W. 97. As stated in some of these decisions, there is a conflict of authority upon the question suggested, yet it is not an open one in this state. In *Lampman v. Van Alstyne, supra,* the court stated:

"This [conflict] has grown out of the gradual development of the law from an early period, when it was quite generally held that only occupants in good faith could acquire title by adverse possession, to the rule obviously prescribed by statute, but reluctantly adopted by the courts, doing entirely away with all necessity for judicial investigation into the hidden motives of the entry or possession and all questions of good faith respecting the same, and substituting instead the rule that open, exclusive, continuous, uninterrupted, and hostile possession for the statutory period, whether in good faith respecting boundaries or title, or whether applied to actual possession or actual possession of part accompanied by constructive possession of the balance included in a written instrument upon which the claim of title is based, does the work."

This doctrine has been fully recognized in other jurisdictions, and is explicitly set forth in the case of *Bryan v. Atwater,* 5 Day, 181:

"What, in point of law, is an adverse possession, without reference to any presumption to make out such possession?

It is a possession not under the legal proprietor, but entered into without his consent, either directly or indirectly given. It is a possession by which he is disseised and ousted of the lands so possessed. To make a disseisin, it is not necessary that the disseisor should claim title to the lands taken by him. It is not necessary that he should deny or disclaim the title of the legal proprietor. No; it is necessary only that he should enter into and take the possession of the lands as if they were his own—to take the rents and profits, and so manage with the property as the legal proprietor would manage with it. If property be so taken and so used by any one, though he claims no title, but avows himself to be a wrongdoer, yet by such act the legal proprietor is disseised. . . . In truth, to determine whether or not the possession be adverse, it is only necessary to find out whether it can be considered as the constructive possession of the legal proprietor."

We think, under the evidence, these issues should be submitted to and decided by a jury. The judgment must be reversed, and a new trial ordered.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

WALLACE, Respondent, vs. ST. JOHN and another, Appellants.

October 24—November 17, 1903.

Husband and wife: Joint tenancy: Conveyance by wife.

Since the enactment of the Revised Statutes of 1878, a conveyance of land running to husband and wife makes them joint tenants, and the wife may convey her interest as if she were unmarried.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

This is an action to quiet title to the lands described. The trial court found as matters of fact, in effect, that in 1869 the plaintiff, *Joseph C. Wallace,* and one Agnes J. Wallace, since deceased, were married, and continued to be husband and wife and to reside in Milwaukee until December 15, 1901, when Agnes J. Wallace died intestate in Milwaukee; that thereupon the defendant, *Charles W. St. John,* her son by a former marriage, was duly appointed and qualified as administrator of her estate; that Agnes J. Wallace had no children by the plaintiff; that July 17, 1885, the plaintiff purchased from one Leahy, in consideration of $4,000 paid by him, certain land described, and a warranty deed thereof, running to the said *Joseph C.* and Agnes J. Wallace as husband and wife, was on that day duly executed, witnessed, and acknowledged by the said Leahy, and thereupon was on the same day recorded in the register's office,—all of which was done by the direction of the plaintiff; that June 2, 1888, the plaintiff purchased from one Prentiss, in consideration of $8,000, paid by him, certain other real estate described, and a warranty deed thereof, running to *Joseph C.* and Agnes J. Wallace as husband and wife, was on that day duly executed, witnessed, and acknowledged by the said Prentiss, and thereupon was on June 5, 1888, recorded in the register's office; that the plaintiff erected a house upon the first piece of land mentioned, and he and his wife, Agnes J. Wallace, lived in and occupied the same as a homestead.

The court further found that on October 7, 1901, Agnes J. left their home without the knowledge or consent of the plaintiff, and went and lived at a place in Milwaukee provided by her son, the defendant, *Charles W. St. John;* that while living there, and about two months before her death, she commenced an action of divorce against the plaintiff, which was still pending and undetermined at the time of her death; that in the latter part of November, 1901, she voluntarily returned to her home, and remained there until her

death, December 15, 1901; that on the same day the action for divorce was commenced—October 14, 1901—and while she was so living away from the plaintiff, and without his knowledge or consent, she executed, acknowledged, and delivered a deed dated on that day running to the defendant, *Charles W. St. John,* conveying to him an undivided one-half of both parcels of real estate mentioned; for a consideration therein recited to be $7,500, and that said deed was recorded in the register's office on the same day; that the only consideration therefor was a note and mortgage back from *Charles W. St. John* to Agnes J. Wallace, covering the same lands, for $7,500, duly executed, witnessed, and acknowledged, which was recorded on the same day; that the defendant, *Charles W. St. John,* in his individual capacity, has ever since such conveyance to him by his mother claimed to be the owner and holder of such undivided half of the two parcels of real estate mentioned pursuant to such deed, and in his capacity as administrator he claims to be the owner and holder of said note and mortgage of $7,500; that no part of the note has ever been paid.

And as conclusions of law the court found, in effect, that the deed from Leahy to *Joseph C.* and Agnes J. Wallace and the deed from Prentiss to *Joseph C.* and Agnes J. Wallace created in them an estate by the entirety in each of the two parcels of land respectively conveyed to them, and that both of said parcels of real estate were held by them as tenants by the entirety at the time of the execution and delivery of the deed by Agnes J. Wallace to her son, *Charles W. St. John,* and likewise at the time of her death, December 15, 1901; that the deed from Agnes J. Wallace to *Charles W. St. John* conveyed no title to or interest in the two parcels of land mentioned except the life interest of Agnes J. Wallace in the usufruct thereof, and that the mortgage given by *Charles W. St. John* to Agnes J. Wallace created no lien upon the two parcels of land, except upon the life interest of

Agnes J. Wallace in the usufruct of the two parcels of land conveyed by her to *Charles W. St. John,* and that the interest conveyed by the deed and the lien of the mortgage thereon terminated with the death of Agnes J. Wallace, December 15, 1901; that the plaintiff, as the survivor of his wife, Agnes J., is the owner in fee simple of both said parcels of land, and is entitled to judgment in this action adjudging that the deed from Leahy to *Joseph C.* and Agnes J. Wallace, and also the deed from Prentiss to *Joseph C.* and Agnes J. Wallace, respectively conveyed to them an estate by the entirety in each of the two parcels of land, and that both of said parcels of land were held by them as tenants by the entirety at the time of the execution and delivery of the deed by Agnes J. Wallace to *Charles W. St. John,* and likewise at the time of her death, December 15, 1901; also adjudging that all right, title, and interest in and to the land conveyed by the deed from Agnes J. Wallace to *Charles W. St. John,* and likewise the lien upon said lands of the mortgage given by *Charles W. St. John* to Agnes J. Wallace, terminated with the death of Agnes J. Wallace, December 15, 1901; also adjudging that the plaintiff, as the survivor of Agnes J. Wallace, is the owner in fee simple of both of said parcels of land free and clear from the lien of the said mortgage given by *Charles W. St. John* to Agnes J. Wallace, and from any other claim of the defendant, either individually or as administrator of the estate of Agnes J. Wallace, deceased; and also adjudging that *Charles W. St. John* individually and as such administrator be forever barred against having or claiming any right or title to or interest in either of said parcels of land adverse to the plaintiff, and that the plaintiff recover his taxable costs herein against the defendant; and ordered judgment to be entered accordingly. From the judgment entered thereon, accordingly, the defendant, *Charles W. St. John,* individually and as such administrator, appeals.

For the appellants there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Charles Quarles,* of counsel, and oral argument by *Charles Quarles.*

For the respondent there was a brief by *Cary, Upham & Black,* and oral argument by *A. L. Cary.*

CASSODAY, C. J. There is no conflict in the evidence. The controversy is as to the law applicable to the undisputed facts. For thirteen years the plaintiff and his wife, Agnes J., held the title to all the lands in question by deeds running to them as husband and wife. Two months before her death, the wife, Agnes J., deeded the undivided one-half of all of such lands to the defendant, her son by a former marriage, and took back a mortgage for the purchase price. The defendant claims to be the owner of such undivided one-half of such lands by virtue of that deed, and as administrator he claims to be the owner of the mortgage. This is an action to set aside that deed and mortgage, and to have the unincumbered title to all of such lands adjudged to be in the plaintiff. In support of the plaintiff's claim, his counsel contends, and the trial court held, in effect, that during the thirteen years mentioned the plaintiff and his wife, Agnes J., held the title to all such lands as tenants by the entirety; and hence that the deed from Agnes J. to the defendant and the mortgage back were both null and void, except as to the usufruct of the lands during the two months immediately preceding the death of Agnes J.

The question presented is very important, and may be involved in the title to numerous estates. It has received very careful consideration from every member of this court. It is certainly not free from difficulty. It is not easy to harmonize by construction the statutes applicable, enacted as they were at different times remote from each other, and having different objects. To ascertain the true meaning of such statutes, it seems to be necessary to trace their history

and the rules of the common law which they were designed to modify, as well as the decisions construing such statutes.

In the case of *Ketchum v. Walsworth,* 5 Wis. 95, seemingly relied upon by counsel for the plaintiff, the land was conveyed to the husband and wife in 1846, and the husband died intestate July 22, 1849—more than five months prior to the time when the Revised Statutes of 1849 went into effect. See ch. 157, p. 747, of those statutes. The question there presented was whether the wife, as survivor of her husband, at common law and under the Territorial Statutes of 1839 (p. 178) took the whole estate freed from the debts of her husband; and it was there held, among other things, that she did, and that:

"At common law, where an estate is granted to husband and wife, they take by entireties, and not by moieties. Neither can sell without the consent of the other, and the survivor takes the whole. . . . The words of conveyance which would make two other persons joint tenants would make the husband and wife tenants of the entirety."

Such territorial statute was very different from any section of the statute here involved. 5 Wis. 101, 102. It is there expressly stated that the sections of the Revised Statutes of 1849, here involved, did not apply to that case. Pages 101, 104. It follows that that decision is of no significance here, except as it reiterates certain rules of the common law, about which there can be no serious difference of opinion.

So, in the case of *Brown v. Baraboo,* 90 Wis. 151, 154, 155, 62 N. W. 921, the controversy related to the title of land of which George W. Brown died seised December 15, 1847, and without wife or issue; and it was held that under the territorial statute cited the land descended equally to his father and mother, and that, "as they took by descent, and not by purchase, as by grant or devise, . . . they took as tenants in common and by moieties, and not by entireties, and therefore that upon the death of the mother her interest

did not go to the father, her husband, by right of survivorship." That decision furnishes no aid in construing the sections of the statutes here under consideration.

From the time the statutes of 1849 went into effect—January 1, 1850—down to the revision of the statutes of 1878, there were three sections of the statutes contained in chapters on "The Nature and Qualities of Estates in Real Property, and the Alienation Thereof," which were as follows:

"Sec. 43. Estates, in respect to the number and connection of their owners, are divided into estates *in severalty, in joint tenancy, and in common;* the nature and properties of which, respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of *this chapter.*

"Sec. 44. All grants and devises of lands, made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.

"Sec. 45. The preceding section shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, *or to husband and wife.*"

Secs. 43, 44, and 45, of ch. 56, R. S. 1849, and of ch. 83, R. S. 1858.

In February, 1850, an act entitled "An act to provide for the protection of married women in the enjoyment of *their own* property," went into effect. Ch. 44, Laws of 1850. That act was incorporated into the first three sections of ch. 95, R. S. 1858, entitled "Of the Rights of Married Women." Such statutes expressly authorized the wife to "receive by inheritance, or by gift, grant, devise, or bequest, from any person *other than her husband,* and hold to her sole and separate use, and convey and devise," etc., "in the same manner and with like effect as if she were unmarried," etc. R. S. 1858, ch. 95, sec. 3. This court held early that the principal object of the act "was to prevent the property of

the wife from being liable for the debts of the husband, and from being sold or controlled by him." *Wooster v. Northrup,* 5 Wis. 245.

Such were the statutes of this state when the case of *Bennett v. Child,* 19 Wis. 362, came before this court for consideration. In that case the plaintiffs held title to eighty acres of land by virtue of a deed running to them as husband and wife, executed May 1, 1854, and the action was to restrain the sheriff from issuing a deed upon the execution sale against the husband alone, and to set aside the sheriff's sale. The plaintiffs obtained judgment in the trial court, and the same was reversed by this court. In the brief of counsel for the defendants in that case it was urged that by the rules of the common law and sections 43, 44, and 45 of ch. 56, R. S. 1849, and of ch. 83, R. S. 1858, above cited, the deed to husband and wife did not create an estate in common, nor in severalty, but a sort of joint tenancy, within the meaning of the first of those sections, technically known at common law as "tenants by the entirety;" that the effect of such deed to husband and wife was not modified or changed by such statutes giving rights to married women. Among the cases cited in support of such contention were cases from Massachusetts holding that "a conveyance to husband and wife in fee creates a joint tenancy, and not a tenancy in common." *Shaw v. Hearsey,* 5 Mass. 521; *Fox v. Fletcher,* 8 Mass. 274. This court took that view of the case, and held, under the sections of the statutes cited, that "lands granted to husband and wife" were "held by them as at common law," and that such statutes giving rights to married women did not apply; and in part overruled the statement contained in the opinion in *Ketchum v. Walsworth,* 5 Wis. 95, to the effect that neither the husband nor wife could, without the consent of the other, alien "any portion or interest" in the estate. And so it was held in that

case that "the husband's interest, or at least his life estate in such lands," was "subject to sale on execution for his debt." See, also, *Smith v. Smith,* 23 Wis. 176, 180.

Such were the statutes of this state and the decisions under them when the Revised Statutes of 1878 went into effect. Did those statutes change the common-law rule so as to authorize the wife to sever such tenancy by conveyance, as in the case at bar? Counsel for the plaintiff contend that "joint tenancies and tenancies by the entirety are essentially different." But it is well established at common law that the estate created by deed to husband and wife is "essentially a joint tenancy, modified by the common-law doctrine that the husband and wife are one person." 15 Am. & Eng. Ency. of Law (2d ed.) 847, citing numerous cases, among others *Pray v. Stebbins,* 141 Mass. 219, 221, 4 N. E. 824. Thus it is said that:

"A tenancy by entireties created by a conveyance to husband and wife resembles in some respects a joint tenancy. In both tenancies the title and estate are joint, and both have the quality of survivorship. But the estate of joint tenants is divisible, while that of tenants by entireties is indivisible. The former are seised *per my et per tout,* while the latter, as one person in law, are seised *per tout et non per my.* Hence in a joint tenancy either tenant may convey his share to a cotenant or to a stranger, while neither tenant by entireties can convey his or her interest so as to affect the cotenants' joint use of the property during their joint lives, or to defeat the right of survivorship upon the death of either of the cotenants. There may be partition between joint tenants, while there can be none between tenants by entireties." 17 Am. & Eng. Ency. of Law (2d ed.) 652.

The authorities agree that this indivisibility of tenancies by the entirety at common law was in consequence of the *oneness* of husband and wife at common law. 15 Am. & Eng. Ency. of Law (2d ed.) 847. Adjudications cited by counsel

for the plaintiff are to the same effect. *Stuckey v. Keefe's Ex'rs,* 26 Pa. St. 397, 399; *Diver v. Diver,* 56 Pa. St. 106, 109.

The changes in the statutes by the revision of 1878 necessarily had reference to such rules of the common law, as well as to prior statutes. Secs. 43, 44, and 45 of ch. 56, R. S. 1849, and of ch. 83, R. S. 1858, and quoted above, were copied literally into the Revised Statutes of 1878 as secs. 2067, 2068, and 2069, except that in sec. 2067 the words *"these statutes"* are substituted in place of *"this chapter"* at the end of sec. 43 in the prior statute. The change is significant. The words "this chapter" in such prior statutes were confined to "the nature and qualities of estates in real property, and the alienation thereof," and necessarily excluded ch. 95 of the Revised Statutes of 1858, entitled "Of the Rights of Married Women." This is made plain by the revisers' note to sec. 2067, which is as follows:

"Sec. 2067 is amended by writing 'these statutes' instead of 'this chapter' at the end, as there are other provisions besides those in this chapter affecting such estates; e. g., in the chapter on the rights of married women the joint tenancy of the common law in case of husband and wife is changed so that it shall be as between other tenants."

The words "other tenants" manifestly mean other joint tenants. This brings us to the question of the change actually made in "the joint tenancy of the common law in case of husband and wife" by "the chapter on the rights of married women," as found in the Revised Statutes of 1878. As indicated, ch. 95, R. S. 1858, related to property which the wife owned or might acquire in her own right, and not to such as she might hold jointly with her husband. By the revision of 1878 the title of the chapter was changed to "The *Property* Rights of Married Women." Sec. 1 of that chapter was amended by inserting immediately after the word "estate" the following words, "of every description, including

all held in joint tenancy with her husband," so that the same reads, with those words inserted in italics, as follows:

"The real estate *of every description, including all held in joint tenancy with her husband,* and the rents, issues and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property as if she were unmarried." Sec. 2340, R. S. 1878.

So sec. 3 of that chapter, which authorized the wife to receive property from any one "other than her husband" was amended by inserting immediately after the words "estate therein" the following words, "of any description, including all held in joint tenancy with her husband." Sec. 2342, R. S. 1878. The revisers say in their note to sec. 2340 that such sections are

"amended so as to provide more certainly that *all* the real estate of the wife shall be at her sole disposal. It is supposed all is so by the section as it now stands, except the single case of a joint tenancy by the husband. That that case ought to be included is well illustrated by the consequences which happened the wife in the case of *Bennett v. Child,* 19 Wis. 362. The husband's creditors took not only his but her interest in the property jointly held, leaving her only the chance of survivorship. Under the rule as changed by this section the husband's share only can be disposed of by him or his creditors without the wife's action; and, thereby the joint tenancy being dissolved, she will hold her interest in common with the taker of the husband's share."

"Thus it appears," as stated in *Citizens' L. & T. Co. v. Witte,* 116 Wis. 64, 65, 92 N. W. 443, 445,

"that both sections, as so amended, as well as the revisers in their notes, treat the estate created by deed running to husband and wife, as in the case at bar, as an estate 'held in joint tenancy,' instead of being held as tenants of the entirety, as at common law." . . . "Manifestly, the revisers intended by the amendments to cover cases of tenants of the entirety held by husband and wife, especially as in

one section the words 'held in joint tenancy,' follow the words, 'the real estate of every description,' and in the other section follow the words 'any interest or estate therein of any description,' and in both sections they are followed by the words, 'and the rents, issues and profits thereof,' or their equivalent. Unless that is so, the new provisions inserted in the sections are without significance."

Both sections declare that the real estate so held by the wife "in joint tenancy with her husband" shall "be her sole and separate property, as if she were unmarried." There is nothing in the statute to prevent an unmarried female from becoming a joint tenant of real estate with another. In the case at bar the trial court held, as contended by counsel for the plaintiff, that such amendments did make the husband and wife tenants in common as to the rents, issues, and profits. But the amendments to one section of the statutes relate to "the real estate of every description" of any married woman, and in the other to the real estate "of any description" of any married woman. The statutes were not designed to be retroactive. They were prospective, and only relate to estates created after their enactment. The statutes make no distinction between rents, issues, and profits and the title to the property. The deeds in question were executed several years after the revision of 1878. We must hold that the deeds to the plaintiff and his wife, Agnes J., made them joint tenants and that such tenancy was severed by the deed from the wife, Agnes J., to the defendant, *Charles W. St. John.* The result is that the defendant, *Charles W. St. John,* and the plaintiff hold all the lands in question as tenants in common, as stated in the revisers' notes last quoted.

We have not overlooked the case of *Farr v. Trustees A. O. U. W.* 83 Wis. 446, 53 N. W. 738. That was an insurance certificate running to the wife and daughter, and it was held under sec. 2068 of the statutes that they took as joint tenants, with the right of survivorship. The question of hus-

band and wife was not involved, and the severance was not involved. Nor have we overlooked the case of *Feidler v. Howard,* 99 Wis. 388, 393, 75 N. W. 163. That case was determined upon the construction to be given to secs. 2068, 2069, R. S. 1878, and it was held that "a note and mortgage running to a husband and wife are held by them in joint tenancy, and upon the death of one go to the survivor, and not to the executor of the deceased for the payment of his debts." There was no question of severance of such joint tenancy involved, and no reference is made to the statutes giving rights to married women.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to dismiss the complaint.

COBB, Respondent, vs. SIMON, Appellant.

October 24—November 17, 1903.

Master and servant: Liability for servant's torts: Scope of employment: Floorwalker in store: Searching customer for stolen goods: Instructions to jury: Ratification of servant's acts: Retention in employment: Court and jury: Attorney and client: Privileged communications: Excessive damages.

1. Where it was the duty of a floorwalker in a department store to watch customers and to take stolen merchandise away from those whom he discovered in the act of stealing, and in endeavoring to perform this duty, acting upon the honest belief that a customer had stolen property in the store, he locked her in a room and searched her, his employer is liable for such acts, because they are within the scope of the employment.
2. But if the floorwalker knew that the customer had not stolen anything, and falsely or by a trick made it to appear that she had, and imprisoned and assaulted her in order to extort money from her, the employer is not liable for any of such acts, because in doing them the floorwalker stepped aside from his employment and committed a tort for his own purposes.

3. An instruction to the jury, in such a case, that "a master is liable for a wrong done by his servant, whether through negligence or malice of the latter, in the course of an employment in which the servant is engaged to perform a duty which the master owes to the person injured," is *held* so inapplicable to the relations between a merchant and the customers in his store that the giving thereof was error.
4. Instructions, to be helpful to a jury, should not merely state the law in general terms, but should specifically apply it to the facts of the case as the jury may find them to be.
5. The question being whether defendant had ratified the acts of his floorwalker in imprisoning plaintiff and searching her for stolen goods, and the only fact in evidence from which such ratification could have been rightfully found being the retention of such floorwalker in his employment after defendant had been informed of plaintiff's story, an instruction that ratification may be signified by acts of omission as well as of commission, is *held*, while correct as a general proposition, to have been misleading and prejudicial, since under it the jury might well have found ratification from acts or omissions entirely inadequate for that purpose, such as the mere omission of defendant to go to see the plaintiff after being informed of her story.
6. Retention of a servant in his employment after notice to the employer of a tortious act of the servant is evidence of ratification of the act; but to justify the conclusion of ratification the information to the employer should be full and complete.
7. It is not essential in such a case that the information should come from the injured person, but however it comes it should be so convincing and persuasive as to convince the mind of an ordinarily prudent employer that the facts exist which call for the servant's discharge.
8. The question of ratification in such a case is generally one for the jury, in view of all the information which came to the employer.
9. An employee having been arrested and prosecuted criminally for an assault upon one of his employer's customers, the employer called upon the assistant district attorney with reference to the matter. Afterwards, in an action by the injured person against the employer, said attorney was permitted to testify that in that conversation with the employer he stated to the latter the plaintiff's version of the transaction. *Held*, not error. The relation of attorney and client did not exist between the employer and the prosecuting attorney, and hence the communication testified to was not privileged.

10. In an action based upon the unjustifiable acts of defendant's employee in locking plaintiff in a room and searching her for stolen goods, where there was no physical violence and no circumstances of public disgrace or insult, and, though the evidence tended to show that plaintiff suffered from heart difficulty, weakness, and headache as the result of the occurrence, she testified that she could do her own housework and that she was not "nearly so bad as at first," a verdict for $2,500 is *held* excessive, and it is said that upon such evidence any verdict exceeding $1,000 would be so regarded.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

This is an action for assault and false imprisonment. The facts were not seriously in dispute. June 18, 1900, the defendant was the proprietor of a large department store in Milwaukee, in which there were employed four floorwalkers and more than 300 clerks. On the last-named day the plaintiff, a married woman living in Sheboygan county, entered the defendant's store with her daughter Jennie Buscher, who lived in Milwaukee, to do some shopping. They went first to the lace counter and bought some lace, and then bought some dimity at another counter, after which they inquired of one Julius Saxe, one of the defendant's floorwalkers, for the muslin department. Saxe went with them to the muslin counter, where they bought muslin, and afterwards some soap at another counter; Saxe receiving the money for a part, at least, of the purchases. From the soap counter they passed out of one of the outer doors of the store onto the sidewalk, and Saxe followed them. The daughter thus describes what then took place:

"We were three feet away from the outer door of the vestibule on the sidewalk, when Saxe stopped us—tapped me on the shoulder. I looked around to see what he wanted and who he was. He asked me for the lace. I handed him the package of lace I had purchased. He said: 'That is not the lace I want. It is the lace you stole.' I said I did not steal any lace. Then he stepped around sort of back of me and

my mother, who stood at my left, almost directly in front of me, and then he apparently took a bolt of lace of about twelve yards from under her arm, made such a movement, and said, 'Here it is.' That is the first I had noticed or seen anything of it. After he spoke about this, he asked us to come back into the store with him. I turned around and faced him—he was standing almost next to the door, just outside, so people could go in and out—and he said, 'Come back into the store,' and we went."

It further appears by the daughter's testimony that the plaintiff and her daughter followed Saxe back into the store and downstairs into a small room, where Saxe shut and locked the door, and tore open the front of the plaintiff's dress to see if he could find stolen goods, accusing them at the same time of stealing lace, and saying that he would send them to a police station unless they paid him $50; that they were kept there nearly half an hour; that plaintiff denied stealing the lace, and finally they gave Saxe all the money they had, amounting to $15, and he let them out. The plaintiff herself did not attempt to describe the arrest and subsequent transactions, except to say that Saxe stopped them and took them down cellar, and that she sat on a bench, and was unable to walk without help when released. It appeared that Saxe died July 24, 1902, and that his testimony was never taken. There was testimony tending to show that the plaintiff's health was good before the assault, and that since that time she has had palpitation of the heart and nervous weakness.

The jury returned the following special verdict:

"(1) Did the plaintiff sustain an injury on the 18th day of June, 1900, at the defendant's store, known as the 'Boston Store,' in the city and county of Milwaukee, at the hands of one J. H. Saxe? *A.* (by consent of all parties) Yes. (2) Was the said J. H. Saxe on the 18th day of June, 1900, in the employ of the defendant, *Julius Simon,* as floorwalker? *A.* (by consent of parties) Yes. (3) Were the acts causing the plaintiff's injury done by said J. H. Saxe

when acting within the scope of his employment by the defendant? *A.* Yes. (4) Did the defendant ratify the acts of said J. H. Saxe toward the plaintiff, after having learned the fact? *A.* Yes. (5) If the court should be of the opinion that the plaintiff is entitled to recover compensatory damages, at what sum do you assess the plaintiff's compensatory damages herein? *A.* $2,500. (6) If the court should be of the opinion that the plaintiff is entitled to recover, in addition to compensatory damages, punitory or exemplary damages, at what sum do you assess the plaintiff's exemplary or punitory damages? *A.* None."

The defendant moved to set aside the verdict and for a new trial, but the motion was overruled and judgment for the plaintiff entered, from which the defendant appeals.

For the appellant there was a brief by *Fiebing & Killilea* and *Theodore Kronshage, Jr.*, attorneys, and *Oscar M. Fritz*, of counsel, and oral argument by *Mr. Kronshage.*

For the respondent there was a brief by *D. T. Phalen*, attorney, and *Simon Gillen* and *Ernest A. Kehr*, of counsel, and oral argument by *Mr. Gillen.*

WINSLOW, J. The undisputed evidence showed that Saxe was guilty of assault and false imprisonment, and the serious questions in the case were whether the defendant was shown to be liable for the acts of Saxe, either because they were within the scope of his employment or because the defendant ratified such acts after knowledge.

The principle is well understood that the master is liable for the negligent or wrongful acts of his servant committed in endeavoring to perform a duty delegated to him by the master, and this is so notwithstanding the method adopted by the servant may not have been authorized, and may even have been prohibited, by the master. On the other hand, it is equally well understood that if the servant steps aside from his master's business, and maliciously or wantonly commits a tort for the accomplishment of his own purposes, the

master is not liable for such acts. The test is not whether the act was done during the existence of the employment, but whether it was done in the prosecution of the master's business. *Bergman v. Hendrickson,* 106 Wis. 434, 82 N. W. 304.

The scope of Saxe's duties was thus stated on the trial by the defendant:

"It was a part of Mr. Saxe's business to watch customers and prevent them from doing any wrongful acts in the store. It was not a part of his employment or business to settle with them or take from them in case he found anything. If he discovered any one in the act of stealing, *he was either to take the merchandise away from them,* or call the police patrol, or have them arrested, as we have done in very many cases."

And again he says:

"Mr. Saxe's duties in reference to persons suspected of stealing were either to prohibit them from taking the goods when they did not pay for them, or else call for the police and arrest them if they insisted upon it."

Thus it appears that it was Saxe's duty to watch customers and prevent them from doing wrongful acts; also to take stolen merchandise away from customers whom he discovered in the act of stealing. Now if, as matter of fact, Saxe honestly believed that plaintiff had stolen a bolt of lace or other property in the store, and, acting on that belief, imprisoned the plaintiff and searched her, it seems clear that as to these acts, at least, the defendant would be liable, within the rule of the *Bergman Case,* because the servant was attempting to carry out his duty of taking merchandise away from a customer whom he supposed was in the act of stealing it, though using means not authorized by the master. On the other hand, if the servant knew no merchandise had been stolen, but falsely or by a trick made it appear that the plaintiff had the lace under her arm, and imprisoned and assaulted

her in order to extort money from her, the defendant would not be liable for any of his acts, because Saxe had stepped aside from his employment to commit a tort for his own purposes and ends. The defendant strongly claims that the evidence shows the latter state of facts, without dispute, and hence that the third question of the verdict should not have been submitted to the jury. This claim is not without considerable weight. Saxe's version of the transaction was never given, and we have really only the version given by the plaintiff's daughter. She testifies that Saxe stepped back of the plaintiff and apparently took a bolt of lace from under her mother's arm, and said, "Here it is," and that she had not seen anything of it before. A legitimate inference from this evidence, doubtless, is that Saxe produced the lace by some trick or sleight of hand, but is this inference conclusive? The daughter does not say that the lace was not in fact under her mother's arm, nor does she testify that Saxe produced it by a trick; and the plaintiff herself does not testify at all as to the matter, though she must have known what the fact was, and was on the stand as a witness twice. In this situation of the evidence, we think it would be going too far to hold that the inference of a trick by Saxe is conclusive. Upon another trial such fact may perhaps appear, but, as the evidence stands upon this trial, we think it was a question for the jury under proper instructions.

This brings us to a consideration of the instructions given by the court upon the third question. The instructions were in part as follows:

"A man acts within the scope of his employment when the motive which impels him is the performance of a duty with which he is charged by his employer. His method of performing that duty may not have been expressly authorized or have been contemplated, and may have been expressly prohibited; but his acts would be within the scope of his employment, provided he was intrusted with the duty he was

attempting to perform. The test of the scope of employment is the purpose of the act and not its method. Was the object of the act the performance of a duty resting upon the servant? If it was, then the act was within the scope of his employment; otherwise not. A master is liable for a wrong done by his servant, whether through negligence or malice of the latter, in the course of an employment in which the servant is engaged to perform a duty which the master owes to the person injured."

As to all of these instructions, except the last sentence, there is no serious difficulty. They are quite general in their nature, and not as helpful to the jury as more specific statements, such as are contained in the preceding portions of this opinion, would be, but we are unable to say that they are erroneous. We cannot regard the last sentence quoted, however, as in any way applicable to the present case. It would be applicable in the case of an assault upon a passenger by one of the servants of a common carrier, because in such case the common carrier owes the duty to the passenger of transporting him safely and protecting him against injury, including injury from the hands of the carrier's own servants. This principle and its reasons are well understood. *Craker v. C. & N. W. R. Co.* 36 Wis. 657; Wood, Master & Servant (2d ed.) § 321. It has not, however, been applied to a merchant in his relations to customers. It is true that customers in such case are upon the premises by invitation, and the merchant owes the positive duty to the customer of using ordinary care to keep the premises in a reasonably safe condition for use by the customer in the usual way; and this doubtless includes the duty of using ordinary care to employ competent and law-abiding servants, but we do not understand that he insures the customer's personal safety. We have been referred to no cases so holding. The general principle as frequently stated is that persons who come upon premises to do business with the occupant at his express or implied request are there by invitation, and that they are entitled to

the same treatment due to all invited persons, namely, the exercise of ordinary care by the occupant. *Hupfer v. National D. Co.* 114 Wis. 279, 90 N. W. 191. We therefore conclude that it was error to give the sentence in question to the jury in this case, because the case was not one where it could rightly be applied.

Upon the fourth question the court charged the jury as follows:

"'To ratify' means to confirm or approve of, and such ratification may be signified by acts of omission as well as of commission—negatively as well as affirmatively. So, in deciding this question, you may consider what the defendant did not do that he should have done if he desired to disaffirm, as well as what he did do indicative of affirmance or disaffirmance; and you will notice the last part of the question. This ratification or affirmance, if it took place, must have taken place, in order that you may answer this question in the affirmative, after having learned of the facts. You will answer that question 'Yes' or 'No,' as you determine the fact to be from all the credible evidence in the case."

Here, too, it will be noticed that the language is very general. There is no positively erroneous statement in it, but in what respect does it enlighten the jury? They were informed that ratification might be signified by acts of omission as well as by acts of commission, but they were no wiser than before with regard to what acts of omission or commission would constitute ratification. The helpfulness of a charge lies in the application of the law to the facts of the instant case. It does little good to tell a jury that ratification may be signified by acts of omission, and to scrupulously refrain from telling them what acts of omission are meant. Not only does such a charge do little good, but it may become absolutely misleading. For instance, in the present case the only fact in evidence from which ratification could have been rightfully found was the fact (testified to by the defendant, but afterwards partially contradicted by him)

that he retained Saxe in his employ after he had been informed of the plaintiff's story. This being the only testimony on which ratification could be predicated, the jury should have been told under what circumstances retention of the employee constitutes ratification. On the contrary, they seem to have been set adrift without compass or sextant upon an uncharted sea, and allowed to select any act of omission or commission which they chose, and predicate ratification upon it. The vice in this very clearly appears from a moment's consideration of one piece of testimony. Upon cross-examination, the defendant testified that he never went to see the plaintiff after being informed of her story. This was certainly an act of omission. The jury would not have been justified in finding ratification from this fact alone, yet, under the charge, they may well have done this very thing. We cannot but think that, while the language of the charge is not erroneous in law, still, when taken in connection with the facts of the case, it is positively misleading and prejudicial, because it allows the jury to find ratification from acts or omissions which are entirely inadequate for that purpose. Retention of a servant in his employment after notice to the principal of a tort committed by the servant is evidence of ratification of the act by the principal. *Bass v. C. & N. W. R. Co.* 42 Wis. 654; *Robinson v. S. R. T. R. Co.* 94 Wis. 345, 68 N. W. 961. The information to the principal should be full and complete, in order to justify the conclusion of ratification on this ground. *Patry v. C., St. P., M. & O. R. Co.* 77 Wis. 218, 46 N. W. 56. It is not essential that the information should come from the plaintiff, but however it comes it should be more than mere idle rumor and should be so convincing and persuasive as to convince the mind of an ordinarily prudent employer that the facts exist which call for the servant's discharge. Any other rule would necessitate the discharge of faithful employees whenever their conduct is assailed by irresponsible, unfounded gossip,

and such a rule would be plainly unjust both to employer and employee. The question is generally one for the jury, in view of all the information which came to the employer, and was such in the present case, under proper instructions.

A number of rulings upon evidence are assigned as error, but none of them are deemed well taken, and but one of them is regarded of sufficient importance to require special treatment. On the day after the assault upon the plaintiff, Saxe was arrested and prosecuted criminally for the offense; and the defendant, *Simon,* called on the assistant district attorney of Milwaukee county with reference to the matter. The assistant district attorney was placed on the stand by the plaintiff, and testified, against objection, that in that conversation he stated to the defendant *Mrs. Cobb's* version of the transaction at length. This ruling is now assigned as error, and the ground taken seems to be that the communications were privileged, because they were communications between attorney and client. This objection is plainly not well taken. There was no relation of attorney and client between the parties, and the defendant was not even a prosecuting witness. It was rather an attempt on the part of the defendant to explain matters to the prosecuting officer from the defendant's standpoint. We are aware of no rule which excludes such testimony.

We regard the damages awarded as clearly excessive. While the act, as shown by the evidence, was entirely unjustifiable, there were no circumstances of public disgrace or insult; nor was there physical violence. The testimony tended to show that heart difficulty, weakness, and headaches have resulted from the occurrence; but the plaintiff testifies that she does her own housework, except the washing, and that she is not nearly so bad as she was at first. Under the evidence, we should regard any verdict exceeding $1,000 as excessive.

By the Court.—Judgment reversed, and action remanded for a new trial.

LE FEBER and others, Appellants, vs. VILLAGE OF WEST ALLIS and others, Respondents.

October 26—November 17, 1903.

Municipal corporations: Ordinance, when void for unreasonableness: Lighting contract.

1. Though broad scope and great deference will be accorded to the discretion of municipal corporations in the exercise of the legislative powers granted to them, yet such powers, being delegated solely for public purposes, must be exercised with reference to such purposes, and acts which in that aspect are wholly unreasonable will be held invalid.
2. A village ordinance conferring franchises upon and making a contract with a corporation bound the village and its municipal successors for a term of thirty years (and practically for fifty years) to take all its lights from the corporation and pay for them during the whole period at rates definitely fixed therein, which considerably exceeded prices paid elsewhere under similar circumstances. The greatest excess was in the prices for gasoline and oil lamps, which were practically the only lights which the corporation was bound to furnish, there being no provision under which the village could compel the laying of gas pipes or stretching of electric wires. The only reservation of any power of control in the village was of "such rights as it cannot waive" to make ordinances and regulations. There were other provisions significant of a purpose merely to benefit the corporation, without consideration for the public welfare. The village had a population sufficient to make it a city *ipso facto* when the fact should be ascertained by a census. It almost immediately adjoined the city of Milwaukee, and the speedy extension to it of the gas and electrical facilities of that city was beyond reasonable doubt. *Held*, that the ordinance was invalid.
3. The fact that the ordinance had been submitted to and approved by a vote of the electors of the village, so that it was the duty of the village board, under sec. 959—52, Stats. 1898, to grant the franchise, does not prevent the ordinance from being held void for unreasonableness.
4. The unreasonable features of such ordinance and the other portions thereof are so interdependent that the whole must be held void.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

The village of *West Allis* was incorporated June 30, 1902, out of what was formerly agricultural territory taken from the towns of Greenfield and Wauwatosa, and from one to two miles west of the limits of the city of Milwaukee, where had just been located several large manufacturing plants, which had drawn to themselves a considerable settlement, so that by February, 1903, the population amounted to about 1,800. After certain preliminary steps, including an attempted advertisement for proposals and a special election, the village board enacted an ordinance conferring certain franchises upon, and entering into contract with, the *Northwestern Heat, Light & Power Company,* a corporation. That ordinance first conferred upon the company, for the absolute term of thirty years, permission to construct and maintain plant, system, and all necessary equipment and appliances for manufacturing gas and electricity, and selling, furnishing, and distributing to the village and its citizens heat, light, and power by means of electricity, gas, oil, naphtha, gasoline, and acetylene, from plants either within or without the village, and to that end to enter upon all streets and public grounds and use the same for the purpose of conducting, constructing, maintaining, repairing, enlarging, extending, and operating its plants, systems, and business, and generally for the distribution of the authorized light and power; to use any conductors, conduits, etc., of the village, or of any other person or corporation then or thereafter placed in the village, by paying reasonable compensation therefor. The ordinance further provided that, as the village was not at present lighted with gas, the company was given the exclusive right to manufacture and sell gas for light and lay gas pipes within said village, for a period of fifteen years from the date of the ordinance. It was further declared "that all of the rights, permission, and authority given and granted in

this ordinance shall be limited in every respect to the right of said village board so to give and grant in each case." The only provisions in the ordinance regulating the manner of conducting the grantee's business were the following:

"All of the company's posts, poles, wires, and other appliances and equipments shall be reasonably strong and shall be placed and excavations shall be made in such a manner as not to unreasonably impede public travel in public places, and all public places shall be left in otherwise as good condition as at the time of the commencement of the work done at the places in question; and subject to such rights of such village as it can not waive to make reasonable ordinances, rules, and regulations in connection with the exercise and enjoyment of such rights, permission, and authority."

The company bound itself to sell and furnish and keep supplied said village, citizens, persons, and institutions with light

"by said six mentioned means, and any, either or all of them, as hereinafter provided, but with gas and electric light only upon and along those parts of the highways where gas-mains are laid at the time or poles erected and wires strung for the conveyance of electricity, respectively, and to the premises adjoining the highways at such places."

No provision was made requiring the company to lay mains or erect poles and wires, except that:

"the construction of said plant or system or active work in furnishing such heat, light, and power as provided herein, shall be begun within five months from the date of the acceptance of this ordinance by such company, and if such construction or active work is not begun within such five months, then this ordinance shall be null and void."

The village, in consideration of such obligations by the company, contracted and agreed to pay it for light, and also permitted the charge for private lights at rates specified, to wit: $120 a year for each 1,600 candle power arc light, up to fifty, and upon a sliding scale in case of larger number, extending to $95 per year if more than 500 such lights were

used; for gas street lamps, nominally seventeen candle power at works, $36 a year for each light; for oil, naphtha, and gasoline street lights, "of usual strength in such cases," $45 a year for each light; and for incandescent electric lights, nominally sixteen or thirty-two candle power, twenty cents per 1,000 watts, meter measurement. A deduction of ten per cent. from said various prices to be made in case lights burned only till 12 o'clock, and none but *pro rata* deductions to be made for outage of any street lights. The charge for gas, other than street lights, to be at $1.50 per 1,000 cubic feet, with a discount of twenty cents for prompt payment. The company was given power to make regulations as to the method of application by private consumers, the installation and reading of meters, collections, deposits of security by consumers, and

"such other and further usual and customary rules and regulations as to its laying pipes, gasfitting, wiring, inspection by the company, and the like, as may be necessary or convenient in conducting its said business and protecting itself against loss, as long as the same shall be reasonable, not contrary to law, and not beyond the power of said village to permit. Said village shall pass all needful lawful ordinances for the protection of said lighting system."

The village bound itself to all these requirements for the term of thirty years, and that during that period it would use continuously not less than twenty-five all-night electric arc lights, five naphtha lights, five incandescent lights, and "all other lights used by said village for public purposes during said thirty years shall be purchased by said village from said company." It was further provided that, at any time during the four months immediately preceding the expiration of the thirty years, the village should have the option to purchase from the company the said lighting plant and system, upon giving written notice within such four months of the intention so to do, at a price to be agreed upon, and, if

a price cannot be agreed upon, then one to be fixed by arbitrators, one to be selected by the village, one by the company, and the third by the two thus selected.

"If said village or municipality shall fail during said four months to purchase as aforesaid, then the rights, permission and authority and the contract features of this ordinance . . . shall be deemed extended and shall continue to remain in full force and effect for a further term of twenty years, under the same terms and conditions, except in this: that the said company shall, as a further consideration for such extensions, make a general ten per cent. reduction of the rate to said village from said company, in force during the first fifteen years from the date hereof, for gas, electricity, oil, naphtha, gasoline and acetylene, as sold to said village."

The company was to give a penal bond of $5,000 for faithful compliance on its part with the terms of the ordinance. Such ordinance, upon signature by the president and clerk of the village and by the company, was to become a contract. It was so signed on or about February 16, 1903.

The plaintiffs and appellants, describing themselves as residents and taxpayers of the village, brought this action on the 24th day of February, 1903, praying that the contract embodied in said ordinance be adjudged void, and that the village, its officers, and the company be enjoined from carrying out the same or creating any liability against the village or making any payment under it. The case was tried to the court without a jury, and a so-called "finding" filed, declaring, first, that the allegations of the complaint, except so far as admitted by the answers of the defendants, are not sustained by the evidence; and, second, that the allegations of the answers of said defendants are substantially correct and true; whereupon judgment was rendered dismissing the complaint, from which the plaintiffs bring this appeal.

For the appellants there was a brief by *Edgar L. Wood*,

attorney, and *Quarles, Spence & Quarles,* of counsel, and oral argument by *Mr. Wood* and *Mr. T. W. Spence.*

For the respondents there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas,* and oral argument by *F. H. Remington* and *J. G. Flanders.* To the point that it is the policy of the law to invest the municipal authorities in such cases with very broad discretion, which the courts will not undertake to control except in case of the grossest and most palpable abuse, they cited *Atlantic City W. W. Co. v. Atlantic City,* 48 N. J. Law, 378; *Houston v. Houston City St. R. Co.* 83 Tex. 551, 19 S. W. 127; *Illinois T. & S. Bank v. Arkansas City,* 76 Fed. 271, 34 L. R. A. 525

DODGE, J. It is perfectly well settled in this state, as in most others, that municipal corporations are not completely beyond judicial review and control, even in the exercise of the jurisdiction and discretion delegated to them by the legislature. True, that discretion must and will be accorded broad scope and great deference. The honest judgment of the municipal authorities as to what is promotive of the public welfare must ordinarily control, although not in accord with the views of courts. Nevertheless the delegation of legislative power to subordinate political divisions of the state is solely for public purposes, and must be exercised with reference to them. If an act be so remote from every such purpose that no relation thereto can, within human reason, be discovered, such act must be deemed excluded from the delegation. To that extent, then, courts will inquire into the purpose and policy of municipal conduct, and will hold unauthorized, and invalid, acts which are wholly unreasonable. *Hayes v. Appleton,* 24 Wis. 542; *Barling v. West,* 29 Wis. 307, 315; *Clason v. Milwaukee,* 30 Wis. 316; *Cook v. Racine,* 49 Wis. 243, 5 N. W. 352; *Atkinson v. Goodrich T. Co.* 60 Wis. 141, 160, 18 N. W. 764; *Stafford v. C. V. E.*

R. Co. 110 Wis. 331, 351, 85 N. W. 1036; *State ex rel. Wis. Tel. Co. v. Sheboygan,* 111 Wis. 23, 37, 86 N. W. 657; *Hurley W. Co. v. Vaughn,* 115 Wis. 470, 476, 91 N. W. 971; *State Center v. Barenstein,* 66 Iowa, 249, 23 N. W. 652; *Hall v. Cedar Rapids,* 115 Iowa, 199, 88 N. W. 448; *Flynn v. Little Falls E. & W. Co.* 74 Minn. 180, 77 N. W. 38, 78 N. W. 106; *State ex rel. Att'y Gen. v. Cincinnati G. L. & C. Co.* 18 Ohio St. 262, 301; *Chicago v. Rumpff,* 45 Ill. 90, 96; *Davenport v. Kleinschmidt,* 6 Mont. 502, 533, 13 Pac. 249; *Lamar v. Weidman,* 57 Mo. App. 507, 510; Dillon, Mun. Corp. §§ 97, 311, 443.

The ordinance before us is assailed as thus unreasonable. Most prominent among the elements claimed to render it so is the extraordinary term, of thirty years certainly and fifty years contingently, through which the village and its municipal successors are bound under its terms to take all its lights from this company and pay for them at rates now definitely fixed. That a term of thirty years in a contract for water supply is not under all circumstances sufficient alone to invalidate the contract as unreasonable is a proposition now settled. *Oconto W. S. Co. v. Oconto,* 105 Wis. 76, 80 N. W. 1113; *Hurley W. Co. v. Vaughn,* 115 Wis. 470, 91 N. W. 971. This is the extent, however, to which this court has gone, and thirty-one years seems to be the longest period sustained in any cited case. *Reed v. Anoka,* 85 Minn. 294, 88 N. W. 981. On the other hand, much shorter terms of contract, either for other service than water supply or complicated by other elements, have been held unreasonable. The considerations which in the *Oconto Case, supra,* were deemed sufficient to warrant a thirty-year contract for water, namely, magnitude of investment and time required to develop private consumption to the profit-producing point, apply, though in less degree, to a gas-lighting contract, in greatly diminished degree to the supply of electric lights, but hardly at all to supply of naphtha or oil street lights,

where no outlay for plant is required. Hence a term of contract for any of these forms of lighting might well be unreasonable, though sustainable in a water-supply contract. Further, we cannot deem the contract period in the present ordinance other than fifty years. The contingency upon which the village may limit it to thirty years is so restricted as to be hardly worthy of mention. The practical possibility of securing municipal action or effecting fiscal arrangements during a four-months period, not to occur till thirty years hence, is slight. The opportunity for the company to refuse to agree on price, and to render practically ineffectual the provisions for arbitration by selecting as its member of the board one who may refuse assent to any impartial third member, is obvious.

A further very obvious and cogent consideration consists in the difference between the situation of *West Allis* and that of either Oconto or Hurley. Both the latter were, and were likely to remain, individual and independent communities, with no opportunity to obtain water or light from plants established elsewhere, and with prospects of but normal municipal growth and development. *West Allis* was in practical effect a part of the urban development of Milwaukee, though outside its limits. Its existence was due to the already accomplished fact of the location of vast factories as part of the business and manufacturing aggregation pertaining to the metropolis. Its streets were laid out in continuation and extension of the system already existing in Milwaukee. The electric street car lines of that city already traversed the new village. Its proximity was such that speedy extension to it of the gas and electrical facilities existing in the city was beyond reasonable doubt.

Yet further, the legislature has established, as to cities, ten years as the limit permissible for lighting contracts. Subd. 34, sec. 925—52, Stats. 1898. The evidence made apparent that *West Allis,* at the time of this contract, had

already attained population more than sufficient to make it a city *ipso facto,* though that fact could not be effectively established until a state census should be taken. Sec. 925*g,* Stats. 1898. While legally a village, so that the absolute legislative limitation on cities did not apply, yet obviously all the reasons which induced such legislative limit are cogent as reasons why it ought not to be exceeded by this village. All these distinctions render it obvious that the two Wisconsin cases above cited can have no controlling effect as to the reasonableness of the time limit in this contract, even if that were the only extraordinary element therein.

That a fifty-year term, even for gas lighting, is extraordinary and far in excess of any sustained by authority, we have already said; also that the situation was such as to make specially unnecessary any extraordinary and special provision for lighting plant; but whether any mere length of time alone must force conclusion of unreason we need not decide; that element is certainly one which, with others, must have effect, though insufficient alone. One such additional element was the price agreed to be paid throughout the term. Without going into detail of the evidence, it is apparent that such prices considerably exceeded those elsewhere paid under substantially similar circumstances; electric arc lights by thirty per cent. to fifty per cent., gas lights by twenty-five per cent., and gasoline lights by seventy-five per cent. These excessive prices for so long a term were rendered the more unreasonable by the probability, already mentioned, that the gas and electric lighting facilities of Milwaukee would speedily be extended to this village, with prices lower than those with which the above comparisons are made. Also, it is striking that the greatest excess in price was upon the gasoline lights, with which the village might in the main be forced to content itself at the will of the company, as we shall presently demonstrate. These, of course, might be supplied by any one without large preliminary investment, and

present none of the reasons for long-term contract or large price which might be urged in favor of gas or electric lighting, for which expensive plant must be provided.

Not the least striking characteristic of this ordinance is its omission of all the ordinary reservations to the village of power to control the manner of its performance in those respects in which time and circumstances must make wise provision in advance impossible; also the absence of any binding contract on the part of the company to furnish lights of the kinds and at places which public welfare may demand. The only reservation of any power of control in the village is of "such rights as it cannot waive" to make ordinances and regulations. This is, of course, a most extraordinary provision, utterly needless and meaningless in a contract, and no adequate substitute for those reservations usually so industriously made in franchises and contracts of this sort. Further, the company is given power to make all regulations in its discretion, some of which may be very burdensome alike to the village and to the private consumers, with only the limitation that they shall be reasonable and not contrary to law and not beyond the power of said village to permit. A more complete surrender by a village of its power to protect the public welfare in the important matter of street lighting can hardly be imagined.

As to the agreement of the company to supply lights, it is substantially without force except as to gasoline or oil lamps. The agreement is in terms to keep the village and its citizens supplied with light by the six mentioned means and any or all of them. This, perhaps, would give option to the city, and might enable it, to compel the supply of gas and electric light at places where necessary; but it is at once qualified by the limitation that such supply shall be with gas and electric light only upon and along those parts of the highways where gas mains are laid at the time, or poles erected and wires strung. We search the contract in vain for any power in the

city to compel the company to lay its pipe or stretch its wires at any specific place or to any specified extent. The only burden in the latter respect assumed by the company is that it shall commence the construction of its plant and active work in furnishing light within five months from the day of acceptance of the ordinance. As to when such construction shall be completed, the ordinance is silent, as also as to what shall constitute such completion. Even if this may require that either an electric or a gas plant be established, there is nothing here to require the laying of even a single block of gas pipe or the stretching of a single block of wire. Certainly, when the company shall have gone to even that extent, it will have satisfied every term of the contract. The rest of the village, if lighted at all, must be lighted with oil or gasoline, at prices, as we have said, seventy-five per cent. above those charged elsewhere, and with an absolute restriction upon the village against purchasing from any one else even this temporary form of light. The result is that this village has bound itself for fifty years to buy oil or naphtha lights from this company at a grossly excessive price, presumably so profitable as to remove the motive of self-interest which perhaps might otherwise be relied on to induce extension of gas mains and electric wires sufficiently to meet the most pressing public needs. Thus the village may never within that term be able to obtain, except to the most trifling extent, any of the modern forms of street lights, for it can buy them of no one else.

We have perhaps carried the detailed analysis of this ordinance further than was necessary, and may end it here, although there are various other phrases, clauses, and provisions of the contract most significant of a result or purpose to merely benefit the company, without thought or consideration for the public welfare. We cannot avoid the conviction that the terms of this ordinance and contract bring it within

that degree of unreasonableness which, after yielding all due deference to the discretion vested in the municipality, compels us to say that that body has transcended the powers delegated to it by the legislature, and that its act in passing this ordinance and entering into this alleged contract is void for that reason.

Some contention is made that because the legislature requires the village board to grant a franchise when, upon submission to popular vote, the majority of the votes have been in the affirmative (sec. 959—52), the doing of such act is no longer discretionary with the village board, but is in effect the act of the legislature, and therefore cannot be reviewed by the courts as to its reasonableness. This argument confuses the municipal corporation with the village board. It is not alone the acts of one or another of the several village officers which are subject to review for unreason by the judiciary, but the act of the corporation itself, which is also a mere delegate of certain powers, which it must exercise within such delegation. Now, the electorate of this village, in special election assembled, is none the less an agency of the municipality than is the village board or any of the village officers, within their respective jurisdictions. True, the electorate comes nearer to the whole people of the village, who are the corporation, but it does not constitute the whole. It may speak for and bind the whole only within the limits of the authority conferred upon it, just as can the village board or any other officer. No authority is cited for the proposition that, because the village acts in some other way than through its village board, its acts, however unreasonable, are beyond revision and correction by the judiciary, and no reason presents itself to our minds in favor of such view. This ordinance, if unreasonable, is as much void when approved by a certain number of the electors as if the village had acted through any other of its authorized agencies, though doubt-

less the assent of so large a part of the community would be recognized by the courts as a cogent circumstance in support of the reasonableness of an ordinance.

It is further urged that although we might find this ordinance unreasonable and therefore illegal in certain respects—as, for example, in its length of time—we should restrict the invalidity to those elements, leaving valid the other portions. It is hardly necessary, after the discussion of the grounds of the invalidity of this ordinance, to say that they so permeate the whole and are so obviously interdependent, and the consideration, either to the village or to the company, for all the provisions thereof, that no such severance is possible. We cannot, for example, eliminate one half of the price for gasoline lamps and say that the ordinance and contract shall stand valid as against the company at such diminished price; nor can we supply in the contract an agreement by the company to supply lights of different kinds, as the village government may deem public welfare to demand in the future. Hence we can find no escape in this contention from the conclusion of complete invalidity.

Many other grounds for invalidating the ordinance in question are asserted and have been vigorously argued, but, as complete invalidity results from the considerations already stated, discussion and decision of the others would be needless expenditure of labor. We therefore do not pass upon them.

By the Court.—Judgment reversed, and cause remanded with directions to render judgment in favor of the plaintiffs according to the prayer of the complaint.

MEEHAN, Plaintiff in error, vs. THE STATE, Defendant in error.

October 26—November 17, 1903.

(1, 2) *Appeal and error: Briefs.* (3-8) *Criminal law and practice: Evidence: Amendment of information: Instructions: Reasonable doubt.*

1. Failure of a brief to give any reference to the place in the record where the evidence or transaction as to which error is assigned can be found, is in direct violation of Supreme Court Rule VIII.
2. Counsel are not justified in alleging errors which they cannot support by any argument.
3. On a trial for assault it was proper to refuse to permit the complaining witness to be cross-examined as to whether at one time he ran a sporting house and was still in that business, such questions having no relevancy to the issue.
4. Error in excluding testimony as to a fact in response to one question is cured by permitting the same witness to testify to that fact immediately afterward in response to another question.
5. An information charging robbery of a silver watch may be amended at the trial by changing the word "silver" to "gold."
6. Error in permitting amendment of a count in an information is not prejudicial where the accused was not convicted on that count.
7. Refusal to give a requested instruction is not error where the subject was fully and exhaustively covered in the instructions given.
8. Omission of the trial court, in the exercise of its discretion, to give to the jury a definition of reasonable doubt, is not error, especially where there was no requested instruction giving any definition.

ERROR to review a judgment of the circuit court for Florence county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

The plaintiff in error was convicted of the charge of assault with a dangerous weapon upon one Morrisino and one Batisto with intent to rob, upon evidence tending to show that, as Batisto and Morrisino came to the door of the

former's saloon at about midnight, the plaintiff in error and one Rice attacked them, demanding that they deliver up their money, the plaintiff in error exhibiting a pistol and threatening to shoot unless they surrendered their property. An encounter took place, in the course of which plaintiff in error's pistol was discharged, considerable personal injury was done both Batisto and Morrisino, and after the fracas Batisto's watch and some money were missing. To a judgment sentencing plaintiff in error to the state reformatory for an indeterminate term of not less than two nor more than five years, this writ of error was brought.

For the plaintiff in error the cause was submitted on the brief of *W. B. Quinlan.*

For the defendant in error there was a brief by the *Attorney General* and *Walter D. Corrigan,* second assistant attorney general, and oral argument by *Mr. Corrigan.*

DODGE, J. The plaintiff in error alleges some twelve or thirteen assignments of error, but nowhere gives any reference to the place in the record where the evidence or transaction complained of can be found. Further, with but three or four exceptions, he apparently has been unable to find either argument or authority to support his charges of error. Such a brief does not merit commendation. The failure of references to the record is, of course, a direct infringement of the rules. Rule VIII. Neither is it justifiable in counsel to allege errors against a trial court which he cannot support by any argument. Notwithstanding the deficiencies in the presentation of the case, however, we have endeavored as far as possible to ascertain the merits or demerits of the trial, and shall dispose of such questions as seem worthy any discussion.

1. Error is assigned upon the sustaining of objections to inquiry on cross-examination of the complaining witness whether at one time he ran a sporting house near Norway,

and whether he was in the same business at the time of the trial. Of course, the effect of such questions, if an affirmative answer was to be expected to them, was merely to degrade and vilify the witness. The fact that he was engaged in such business had no relevancy to the guilt or innocence of the accused. The action of the court in refusing to permit such cross-examination cannot constitute reversible error. *Emery v. State,* 101 Wis. 627, 649, 78 N. W. 145; *Crawford v. Christian,* 102 Wis. 51, 53, 78 N. W. 406; *Paulson v. State,* 118 Wis. 89, 94 N. W. 775.

2. An asserted error predicated upon exclusion of proof that one of the persons assaulted was of quarrelsome disposition when intoxicated was promptly cured by permitting the same witness to testify to that fact immediately afterward in response to another question.

3. Error is assigned because the court permitted the information to be amended by describing the watch of which one count of the information alleged robbery as a gold watch instead of a silver watch. Any error in this respect must have been without prejudice, however, as the plaintiff in error was not convicted upon the count so amended. Independently of this view, however, the amendment was entirely proper to be allowed, under secs. 4703, 4706, Stats. 1898. *Secor v. State,* 118 Wis. 621, 95 N. W. 942.

4. Error is assigned upon refusal to give to the jury an instruction requested in the same language considered and approved in *Franklin v. State,* 92 Wis. 269, 66 N. W. 107, generally to the effect that each juryman should be individually convinced beyond a reasonable doubt of the guilt of the accused before he should consent to a verdict of guilty. An examination of the charge discloses that the subject was fully and exhaustively covered in the instructions in fact given to the jury, and, while the exact language requested by the plaintiff in error may well have been proper, no prejudicial error can be asserted when the same idea is correctly and ade-

quately conveyed to the jury. True, counsel asserts in his brief that this subject was not covered by the instruction given, but makes no effort to point out the elements contained in the request which were lacking in the charge. None such are apparent to us.

5. Error is assigned on the omission of the court to make any attempt to define reasonable doubt further than to say that it is not a mere imaginary doubt. The court stated to the jury: "I won't tell you what a reasonable doubt is. It is quite a difficult thing, but I think you, as intelligent men, will understand what is meant." There was no requested instruction giving any definition, which circumstance of itself would preclude counsel from effectively assigning error upon the omission, but, as has often been said by courts, the propriety of definition of ordinary words in the English language is a question calling for the exercise of the discretion of the trial court. Appellate courts have differed as to the advisability of attempting to amplify or explain the meaning of the expression "reasonable doubt." In opinions emanating from different members of this court, variant personal views have been expressed as to the wisdom or advisability of such attempts, but the exercise of its discretion by the trial court as to whether to make the attempt or not has never been held subject of review or cause for reversal, unless, indeed, the attempt were made and the definition were inaccurate and misleading. *Hoffman v. State,* 97 Wis. 571, 576, 73 N. W. 51; *Emery v. State,* 101 Wis. 627, 78 N. W. 145; *Buel v. State,* 104 Wis. 132, 151, 80 N. W. 78.

6. A large number of quotations from the argument of the district attorney to the jury are assigned as errors, but after careful examination we can find nothing in them demanding even comment. We find none of the errors well assigned.

By the Court.—Judgment and sentence are affirmed.

EGGETT, Respondent, vs. ALLEN, Appellant.

September 29—December 11, 1903.

Malicious prosecution: Evidence: Conclusiveness of decision on former appeal: Instructions to jury: Probable cause: Malice: Court and jury: Punitory damages: Excessive damages.

1. In an action for malicious prosecution of plaintiff on charges of obtaining money under false pretenses and of embezzlement, plaintiff claimed that the prosecutions were instituted for the sole purpose of collecting the money due under a contract for the sale of land to him by defendant, and hence were malicious. *Held*, that evidence that after the prosecutions a man placed upon the land by defendant forbade plaintiff to go thereon, was admissible as throwing light upon defendant's motives in the prosecution.
2. A decision of this court upon a former appeal, upon substantially the same record, that the exclusion of certain evidence, if erroneous, was not prejudicial, is the law of the case on the second appeal.
3. In an action for malicious prosecution the reception in evidence of the justice's minutes of testimony taken on such prosecution was error, but not prejudicial where substantially all the facts contained in such minutes were either admitted or testified to without contradiction in the action.
4. Instructions that "probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest or strong suspicion that the person arrested is guilty," and that "mere belief of guilt, however strong, sincere, and honest, will not constitute probable cause, unless founded on circumstances sufficient to warrant it," are approved.
5. Whether a prosecution is malicious or not is a mixed question of fact and law. If the jury find that the prosecution was begun for a vindictive, ulterior, or unlawful purpose, the law then says that there was legal malice, and if the jury also find lack of probable cause the cause of action is complete.
6. The discharge of defendant in a criminal prosecution because of a lack of evidence to convict is *prima facie* evidence of want of probable cause for the prosecution, even though the magistrate did not certify to that effect in his docket, nor render judgment against the complainant for costs, as permitted by sec. 4791, Stats. 1898, in such cases.

7. The court instructed the jury that though the signature to the criminal complaint might not be defendant's, yet if he counseled with his attorney and authorized the prosecution and took part in maintaining it he is liable; but that they might consider the question whether he signed the complaint, and whether he supposed the proceedings were tort or criminal in their nature, as bearing on the question of malice. *Held*, that any inaccuracy in limiting the effect of defendant's supposition as to the nature of the proceeding to its bearing on the question of malice, whereas it might also have a bearing on the question of probable cause, was cured by a subsequent instruction that the jury might consider what transpired between the defendant and his attorney, in deciding whether he acted maliciously and without probable cause.

8. Where the jury were charged, in effect, that there could be no recovery if the criminal prosecution was the unauthorized act of an agent of defendant, it was not error, in a subsequent instruction as to punitory damages, to omit to state that, if the prosecution was such unauthorized act, ratification thereof by defendant must be shown in order to charge him with punitory damages.

9. An instruction that under certain circumstances the jury were "authorized" to award punitory damages was strictly correct and did not carry the implication that such damages must be awarded; but it would have been better had the jury been more clearly informed that the matter was in their discretion.

10. Wantonness or an aggravated degree of malice is not necessary to justify an award of punitory damages for a malicious prosecution; but such damages may be given where plaintiff recovers at all, at least where the prosecution was begun or actively carried on by the defendant himself and was not the unauthorized or unratified act of an agent.

11. An award of $1,000 damages for malicious prosecutions upon charges of embezzlement and of obtaining money under false pretenses, is *held* not excessive.

APPEAL from a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

R. J. MacBride, for the appellant.

For the respondent there was a brief by *Chas. F. Grow* and *J. R. & C. R. Sturdevant*, and oral argument by *C. R. Sturdevant.*

The following opinion was filed October 20, 1903:

WINSLOW, J. This is an appeal from a judgment in favor of the plaintiff in an action for malicious prosecution. The complaint contained two counts—one for a prosecution for obtaining money under false pretenses, and the other for a subsequent prosecution for embezzlement. The action was once tried, and a judgment for the plaintiff was reversed by this court. 106 Wis. 633, 82 N. W. 556. Upon the second trial the jury returned a verdict for the plaintiff, assessing his damages at $300 upon the first cause of action, and $700 upon the second. The pleadings are the same as upon the former appeal.

A number of exceptions were taken, which will be discussed as far as seems necessary. The difficulties between the parties arose out of a real estate deal, March 30, 1896, by which *Allen* contracted in writing to sell to *Eggett* eighty acres of land for $1,350, of which $100 was paid down, and the balance was to be paid in annual instalments, running through five years; it being further agreed that sixty per cent. of the proceeds of any timber taken off the land by *Eggett* should be paid to *Allen*. There was evidence tending to show that *Eggett* cut considerable timber from the land during the following winter and did not pay any part of the proceeds to *Allen*. In March, 1897, *Allen*, learning this fact, consulted G. I. Follett, an attorney at Loyal, Clark county, and on the 23d day of March, 1897, a criminal complaint, purporting to be signed by *Allen*, was filed before G. W. Barker, a justice of the county, charging *Eggett* with having obtained the land contract on the false and fraudulent representation that he (*Eggett*) was more than twenty-one years of age, when in fact he was a minor. *Allen* denied having signed this complaint or having had anything to do with the prosecution thereof. The plaintiff's claim in the present case was that both of the prosecutions complained of were instituted by *Allen* for the sole purpose of collecting the money due from the sale of the timber cut on the

property by *Eggett,* and hence malicious. In attempting to prove this element of malice, the plaintiff testified that after the second prosecution had ended *Allen* had a man on the land in question plowing, and that this man forbade him (*Eggett*) from going on the place. Motion was made to strike out that part of the answer about the man forbidding *Eggett* going on the place, but the testimony was allowed to stand, and exception taken. We can see no error in the ruling. If *Allen* himself had forbidden the plaintiff from going on the place, it would certainly be admissible, as throwing some light upon *Allen's* motives in the prosecution; and, when it appeared by positive testimony that he (*Allen*) had placed a man on the place to cultivate it, we think that the act or statement of that man in refusing to allow *Eggett* on the place must also be admissible upon very familiar principles of agency.

The plaintiff was asked upon cross-examination whether he did not vote at the presidential election in November, 1896, and an objection to the question was sustained and exception taken. Whatever our views of the relevancy of this question might be as an original proposition, it is sufficient now to say that the same objection was sustained upon substantially the same record, so far as this point is concerned, upon the former appeal, and the ruling was assigned as error, and this court held that, even if erroneous, the ruling was not prejudicial. This settles the question for this case, and renders any discussion of it unnecessary.

The plaintiff introduced the record of the justice in the embezzlement prosecution, and as a part of it the justice's minutes of the testimony taken, which consisted simply of the evidence of the defendant, *Allen.* Objection was made to the reception of the minutes, but it was overruled, and this ruling is now claimed to be error. Doubtless the ruling was erroneous. If it became necessary to show what was

sworn to on that hearing, it should have been done by examination of the justice himself, or of some witness who heard it. *Zitske v. Goldberg,* 38 Wis. 216. However, there was no prejudicial error in admitting it. It was admitted that *Allen* did testify as a witness on that hearing, and all the facts which appear in the minutes were either admitted or testified to without contradiction on this trial, except the statement that *Eggett* was not apprenticed to the defendant, and we cannot regard this as of sufficient moment to be seriously considered as a ground of reversal.

We have found no prejudicial error in the remaining exceptions to rulings on evidence, and do not deem them of sufficient importance to review.

The court charged the jury on the subject of probable cause as follows:

"Probable cause has been defined to be such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty. . . . Whether the facts known to the defendant were such as to lead him, as a man of ordinary caution and prudence, to believe and entertain an honest and strong suspicion that plaintiff was guilty of either charge is submitted to the jury, to be decided as a question of fact."

Inasmuch as the foregoing definition was approved on the former appeal, there can be no question of its correctness so far as this case is concerned, nor do we see any fault to be found with it, even if the question were open for discussion. The radical difference between this definition and the one which was condemned on the former appeal is apparent at a glance.

In this connection the court also charged as follows:

"Mere belief of the defendant in plaintiff's guilt, however strong, sincere, and honest, will not constitute probable cause, unless founded on circumstances sufficient in reason to warrant it."

This, also, is attacked as erroneous, but it is manifestly correct and merely a corollary of the propositions previously cited.

Upon the subject of malice, the court charged as follows:

"Malice may consist of any motive other than a desire to bring a guilty party to justice. A prosecution is malicious when actuated by hostile or vindictive motive, provided there is also a lack of probable cause, as is hereinafter explained. A prosecution instituted wilfully and purposely, to gain some advantage to the prosecutor, or through mere wantonness, or carelessness, if it be at the same time wrong and unlawful within the knowledge of the actor, and without probable cause, is, in legal contemplation, malicious."

The court also repeated the substance of the foregoing propositions in different phraseology in other instructions, and it is claimed that these instructions are erroneous, in that the facts named do not constitute malice as matter of law, but that they are only evidence from which the jury may find or infer malice if they choose, and hence that the province of the jury was invaded by the instructions.

The instructions given were evidently taken from 19 Am. & Eng. Ency. of Law (2d ed.) 675, 676, and they correctly state the law as we understand it. If the criminal law be set in motion for the purpose of collecting a debt or compelling the delivery of property, or to accomplish some other ulterior and unlawful purpose, then it is begun maliciously as much as though inspired by hatred or revenge. Whether the prosecution in a given case be malicious or not is a mixed question of fact and law. The jury are to determine the question of fact, namely, whether it was begun for a vindictive, ulterior, or unlawful purpose, and when they decide that question in the affirmative the law steps in and says that in that case there was legal malice, and if the jury also find lack of probable cause the law then says that the cause of action is complete. Such was the purport of one of the instructions approved by this court in the case of *Spain v. Howe,*

25 Wis. 625, and we are not aware that the principle has been questioned since that time. It was approved in *Lueck v. Heisler,* 87 Wis. 644, 58 N. W. 1101, and the criticism of the last-named case in *Strehlow v. Pettit,* 96 Wis. 22, 71 N. W. 102, in no wise affected this proposition.

It appears by the evidence that, in the first of the criminal prosecutions complained of, *Eggett* was discharged from custody because the evidence was not sufficient to convict, but no certificate was made that the complaint was wilful and malicious and without probable cause, nor was judgment for costs rendered against the complainant as permitted by sec. 4791, Stats. 1898. The court charged the jury that this discharge was *prima facie* evidence, though not conclusive, of want of probable cause, and this instruction was vigorously attacked. The respondent relies upon the case of *Bigelow v. Sickles,* 80 Wis. 98, 49 N. W. 106, in support of the instruction given. It is said, however, by appellant that the *Bigelow Case* was a case where the justice made the certificate of the presence of malice and want of probable cause, and hence that it is not applicable to the present case. It is true that the *Bigelow Case* might have been decided upon the narrow ground that the certificate aforesaid was made, but the difficulty is that the court did not so treat it, but, on the contrary, after reviewing the authorities on the effect of a simple discharge upon a preliminary examination, and recognizing that there was a conflict, deliberately adopted the broad doctrine that such a discharge was *prima facie* evidence of want of probable cause in all cases whether the certificate aforesaid was made or not. Whatever might be our opinion upon the question as an original proposition, we do not feel called upon to overrule that decision now. It was not shaken by the decision in *Cullen v. Hanisch,* 114 Wis. 24, 89 N. W. 900. It has doubtless been acted upon by trial courts many times since it was made, and we do not feel that there are any considerations so weighty in character as should compel

us to disregard the doctrine of *stare decisis*. If the legislature deems the rule unwise, it can easily change it.

The following instructions were given by the court:

"There is evidence tending to show that a Mr. Follett acted as attorney for the defendant in the proceedings before Mr. Barker. Of course, the defendant is liable if he either commenced these prosecutions himself or authorized and directed his attorney to do so, if in other respects the cause of action stated in the complaint is proved. . . . Now, even if the signature to this complaint is not defendant's, yet if the defendant was there counseling and advising the prosecution of the plaintiff, and taking part in maintaining the prosecution, he would be just as liable as if he signed the complaint. However, you may consider the question whether he signed the complaint, and what he supposed as to the nature of the proceedings, whether they were tort or criminal in their nature, as bearing on the question of malice."

Both of these instructions were excepted to, but we have been unable to see that they are in any wise erroneous. It is said that the last clause quoted is objectionable because limiting the effect of the supposition in *Mr. Allen's* mind as to the nature of the proceedings to its bearing on the question of malice, whereas it also had a bearing on the question of probable cause. Obviously, its most important bearing must be on the question of malice; but, even if it be conceded that it might also be considered on the question of probable cause, still this inaccuracy is cured by a subsequent portion of the charge, where the court informed the jury that they might consider what transpired between *Allen* and his attorney, Follett, in deciding whether defendant acted maliciously and without probable cause. Inasmuch as it appears that whatever supposition *Mr. Allen* had as to the nature of the proceedings was gathered from his conversation with Follett, it seems evident that the question was fully covered.

Upon the subject of punitory damages, the court charged the jury as follows:

"If you find that the defendant, without probable cause and maliciously, caused the arrest of the plaintiff, you are authorized to go further and award punitory damages in such sum as will be a warning to defendant and all other persons not to commit similar wrongs, and consequently such damages, to be effectual, must have some relation to the financial ability of the defendant. It is on this theory that evidence as to defendant's financial ability has been admitted."

This charge is attacked on several grounds. It is said that, if either prosecution was commenced by Follett or some other agent without *Allen's* direction, then it must be shown that *Allen* ratified the act in order to charge him with punitory damages. That this is the rule with regard to a principal's liability for the unauthorized torts of his agent there can be no doubt. *Robinson v. S. R. T. R. Co.* 94 Wis. 345, 68 N. W. 961. But the complete answer to the objection is that there was no question of prosecution by an agent submitted to the jury in this case. The charge of the court was explicit, and did not allow the jury to return a verdict for the plaintiff at all unless it was shown that the defendant himself either commenced or authorized the commencement or actively participated in the prosecutions. So there was no recovery possible under the charge, if the prosecutions were the unauthorized acts of an agent, and hence the question of ratification cut no figure.

Of course, punitory damages are not necessarily to be recovered even if the verdict be for the plaintiff, and we should have been better pleased had the court more clearly informed the jury that the matter was in their discretion, and that they might allow them or not as they thought proper; still the expression used by the court that they "were authorized"

to award them is strictly correct, and does not carry the implication that they must be awarded. Again, it is said that there must be something more than mere malice in order to justify the imposition of punitory damages; that there must, in effect, be wantonness or an aggravated degree of malice. We do not understand this to be the rule. The rule is generally stated to be that where an injury is committed with wantonness *or* malice, *or* under circumstances of insult or indignity, punitory damages are proper. In the case of malicious prosecution, malice is an essential ingredient in the cause of action, without which there can be no recovery even of compensatory damages. Hence it must follow that the recovery of punitory damages is proper in case of malicious prosecution, where the plaintiff recovers at all, at least in all cases where the prosecution was begun or actively carried on by the defendant himself, and is not the unauthorized and unratified act of an agent. *Winn v. Peckham,* 42 Wis. 493.

Some exceptions were taken to the conduct and remarks of counsel upon the trial, but we do not consider them tenable or of sufficient importance to state in detail. We have been unable to see that the damages are so large as to be considered excessive.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied December 11, 1903.

NEWELL and another, Respondents, vs. NEW HOLSTEIN CANNING COMPANY, Appellant.

November 17—December 11, 1903.

Contracts: Construction: Extrinsic evidence of intention: Excusing nonperformance: Destruction of crop by frosts: Entire contract: Tender of part: Liquidated damages.

1. Where a written contract is plain and definite in its terms and without ambiguity, evidence as to the contents of letters which passed between the parties prior to its making is not admissible to show the intention of the parties or add to the agreement a condition not embraced within its terms. Thus, in an action upon written contract for the sale of tomatoes to be packed by the vendor, such evidence is *held* inadmissible to show that the parties contemplated, as a condition of the agreement, that the tomatoes were to be raised on the vendor's fields or in the neighborhood of its cannery.
2. In a contract for the sale of tomatoes to be canned by the vendor, a provision that "if by the destruction of the cannery by fire, or if on account of strikes, or from any other cause over which the seller has no control, he is prevented from performing this contract, he shall not be liable for any damages for such failure," does not include the destruction by frost of the tomato crop on the vendor's fields or in the neighborhood of its cannery, but leaves it the duty of the vendor, notwithstanding such destruction, to make all reasonable effort to secure the necessary fruit and pack it at its cannery.
3. Two ineffectual inquiries in the market,—one at a point eleven miles from the cannery, and one at a place forty-six miles therefrom,—without other efforts to procure fruit, did not constitute a performance of the vendor's duty in that behalf, or excuse nondelivery of the tomatoes according to the contract.
4. A contract for the delivery of 2,000 cases of tomatoes to be canned by the vendor, with certain specific provisions by which either party might decrease such quantity to seventy-five per cent. thereof without paying damages, and might further reduce the quantity upon giving notice by a certain date and upon payment of certain stipulated damages, is *held* to be an entire contract, so that the vendee was not obliged to receive a part of the goods, when tendered with the understanding that the vendor did not intend to deliver the whole.

5. Where no notice was given as provided of intention to reduce the quantity to be delivered below seventy-five per cent. of that named in the contract, the vendor cannot avail himself of the stipulation as to liquidated damages.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Respondents are engaged in the wholesale grocery business in Minneapolis, Minnesota. Appellant is a corporation operating a canning factory at New Holstein, Calumet county, Wisconsin. On April 24, 1901, the parties made the contract out of which this case arises. It provided for the delivery of 2,000 cases standard three-pound tomatoes at eighty cents per dozen; terms, sixty days, or one and one half per cent. for cash in ten days; quality 1901 pack; cases to be well filled with red ripe fruit, etc. The provisions material to this cause were as follows:

"It is further understood and agreed by the parties to this contract that if the seller should deliver only seventy-five per cent. of the quantity stated the purchaser shall accept that amount in full settlement of this contract. If the seller should deliver less than seventy-five per cent. for any cause other than one over which he has no control as hereinbefore specified, then the seller shall pay the purchaser seven and one half cents per dozen on such quantity, but must, except for such causes, deliver fifty per cent. of the original purchase. The purchaser shall have the privilege of reducing the quantity named in this contract to seventy-five per cent. of the original purchase without payment of any damages, and shall also have the privilege of further reducing the quantity on payment of seven and one half cents per dozen, but must accept not less than fifty per cent. of the original purchase." "In case either of the parties to this contract wish to avail themselves of the privilege of decreasing the quantities below seventy-five per cent. of the original purchase, notice must be given not later than July 1st, 1901." "If by the destruction of the cannery by fire, or if on account of strikes, or from any other cause over which the

seller has no control, he is prevented from performing this contract, he shall not be liable for any damages for such failure."

Appellant raised fruits for canning, and to fill the orders for 1901 planted and cultivated about thirty-five acres of tomatoes, and expected to make from 3,000 to 3,500 cases, sufficient to fill the season's orders. On August 26, 1901, it commenced to can tomatoes, but ceased because the fruit was not fully ripened. September 7th and 8th a sharp frost killed appellant's tomato vines, and another heavy frost on September 18th and 19th totally destroyed the fruit. Appellant had put up 400 cases of sound goods before the frosts, and thereafter 200 cases of frost-bitten goods. This amounted to about fifteen per cent. of their orders. October 5th its secretary notified respondents of the frost, and of its inability to fill the contract, and offered to deliver 300 cases. Respondents refused to accept this amount, and demanded a delivery of the whole. Upon appellant's refusal to comply with this demand this action was brought to recover damages for breach of the contract. Judgment was given for the sum of $1,104.72 in favor of respondents, and from that judgment this appeal is taken.

J. E. McMullen, for the appellant.

For the respondents there was a brief by *Bloodgood, Kemper & Bloodgood* and *Welch, Hayne & Hubachek,* attorneys, and *Jackson B. Kemper,* of counsel, and oral argument by *Jackson B. Kemper.*

SIEBECKER, J. The questions arising on the errors assigned in the record require a construction of the agreement sued upon. Under this agreement appellant sold respondents 2,000 cases standard three-pound (can) tomatoes at eighty cents per dozen, of the quality 1901 pack, cases to be well filled with red ripe fruit, to be delivered when packed.

Among other agreements, it provided that either party might reduce the quantity covered by the contract to fifty per cent. of the order, but that notice of such reduction must be given not later than July 1, 1901, and that

"if by the destruction of the cannery by fire, or if on account of strikes, or from any other cause over which the seller has no control, he is prevented from performing this contract, he shall not be liable for any damages for such failure."

Appellant complains of the trial court's ruling in refusing to receive the evidence of the contents of letters which passed between appellant and the firm of brokers through whom respondents made the contract. This testimony was apparently offered to put the court in possession of facts and circumstances: First, to show the intention of the parties in making the contract; and, secondly, to show that both parties contemplated, as a condition of this agreement, that the tomatoes sold were to be raised on appellant's fields, situated near its canning factory. The evidence offered tended to prove matters aside from the surrounding facts and circumstances of the parties to the contract which is proper to aid the court in construing it. This evidence would add an article to the agreement not expressed or covered by its terms.

The terms of the contract are plain and definite in meaning in their literal sense, and also when applied to the subject-matters covered by the transactions. If an ambiguity exists in the contract in either respect, then "evidence of the circumstances under which the contract was made is proper to enable the court, in the light thereof, to read the instrument in the sense the parties intended, if that can be done without violence to the rules of language or of law." *Johnson v. Pugh,* 110 Wis. 167, 85 N. W. 641, and cases cited. This rule does not, however, permit evidence to be introduced of communications respecting it, made prior to and explanatory of the writing. To admit such evidence would

violate this well-established rule, and add a condition to the agreement clearly excluded by its terms. The action of the trial court is sustained by well-known rules governing written contracts.

One of the defenses to excuse delivery of the tomatoes specified in the contract was that appellant was prevented from performance owing to unusual frosts in the month of September, whereby their fruit and the crop in the immediate vicinity and the eastern part of the state were destroyed; and on that account it had raised no tomatoes, nor could it procure any in the vicinity of the factory to comply with this undertaking. Does this present a state of facts which relieves the company from performance of the contract? It is claimed the provision that "if by the destruction of the cannery by fire, or if on account of strikes, or from any other cause over which the seller has no control, he is prevented from performing this contract, he shall not be liable for any damages for such failure," covers and includes the destruction of the tomato crop by frost, as shown by the evidence, and excuses appellant from full performance of the agreement. There is no allusion in the contract to any particular source from which these tomatoes were to be taken except that they should be of the 1901 pack of appellant's cannery. Reading the material provision in the light of the facts and circumstances under which it was made, it seems a reasonable and natural conclusion that the parties did not intend that appellant was undertaking to sell and deliver tomatoes to be grown upon a particular field, or in the immediate neighborhood of the cannery. Had the sale been to deliver a crop grown on appellant's field, or in the neighborhood of the cannery, then the destruction by frost of the crop so specified might be held to be an excuse for the nonperformance of the undertaking under the rule that the promise to deliver a specific article depended on the assumed existence of it at the time of performance, and that it was destroyed

without its fault, rendering performance impossible. Appellant, however, was not restricted under the contract to such field or neighborhood to procure tomatoes to fill the contract. It had the right to go into the open market and purchase tomatoes of the kind and quality specified in the agreement, pack them at its cannery, and deliver them to respondent under the terms of the contract. It therefore was its duty to make all reasonable effort to secure the necessary fruit, and pack it at its cannery, to enable it to comply with its promise. The question arises, Does the evidence tend to show that appellant took the necessary steps to comply with this obligation?

It is undisputed that the tomato crop on its field and in the immediate vicinity of the cannery was destroyed by frost on the 18th or 19th of September. It is testified that this frost extended over the eastern portion of the state. The material part of the evidence on this subject is the testimony of the secretary of the company. He states that the efforts made to secure tomatoes for packing at appellant's cannery were limited to two inquiries in the market—one at St. Nazianz, eleven miles from the cannery; and the other at Appleton, forty-six miles from the factory. No other efforts were made to procure the fruit in other portions of adjoining territory or in the open market. For aught that the evidence discloses, appellant might have secured all the tomatoes needed in the market within a reasonable distance from the factory, making it feasible and practicable to buy the fruit and transport it to the cannery for the purpose of this undertaking. Under this state of facts and circumstances, no grounds were established constituting a legal excuse relieving appellant from performing its obligations under the agreement, and respondents had a right to insist on performance. These conclusions result in affirmance of the action of the trial court in directing a verdict for respondents. *Johnson v. Pugh,* 110 Wis. 167, 85 N. W. 641; *Nilson v. Morse,*

52 Wis. 240, 9 N. W. 1; *Sigerson v. Cushing,* 14 Wis. 527; *Jackowski v. Illinois S. Co.* 103 Wis. 448, 79 N. W. 757; *Boden v. Maher,* 105 Wis. 539, 81 N. W. 661; *Hesser-M.-R. Coal Co. v. La Crosse F. Co.* 114 Wis. 654, 90 N. W. 1094; *Anderson v. May,* 50 Minn. 280, 52 N. W. 530; *McGehee v. Hill,* 4 Port. 170; 1 Am. & Eng. Ency. of Law (2d ed.) 590, and notes.

Appellant tendered 300 cases of tomatoes in part performance of the contract. On this point we are of the opinion that the agreement is an entire one, and respondents were not obliged to receive a part of the fruit when it was tendered with the understanding that appellant did not intend to deliver the whole. Sutherland, Damages (2d ed.) §§ 651, 652; *McGehee v. Hill, supra.*

An exception is preserved, upon which it is urged that the court allowed an excessive amount of damages. It is insisted that one of the articles in the agreement stipulates that the damages for the nondelivery of any quantity less than seventy-five per cent. should be seven and one half cents per dozen cans as liquidated damages. This, however, is conditioned upon the giving of notice by the party seeking to avail himself thereof to the other party not later than July 1, 1901. No such notice was given. Neither party can therefore invoke this right. The judgment of the circuit court was properly awarded.

By the Court.—The judgment of the circuit court is affirmed.

BOYCE, Respondent, vs. WILBUR LUMBER COMPANY, imp., Appellant.

November 17—December 11, 1903.

Negligence: Injury to person switching cars: Court and jury: Evidence: Custom: Obviously dangerous act: Special verdict: Instructions: Proximate cause.

1. Plaintiff, a railroad yardmaster, while switching cars in the nighttime, was riding upon the ladder on the side of a freight car and was knocked therefrom by a car upon an adjoining switch track, which, after being placed upon such track, had been moved by the defendant lumber company to a point nearer where the two tracks came together. The evidence being conflicting as to the width of the cars and whether the two tracks were at any place far enough apart so that a person riding as plaintiff was could pass the other car without injury, it is *held* that the lumber company was not entitled to the direction of a verdict on the ground that it did not, by moving the car, increase the danger.
2. As a general rule, evidence to show the usual or ordinary methods of others in the same business is admissible upon the question of negligence; but this rule is subject to exceptions, among which are that such evidence cannot be allowed to contradict common knowledge, nor is it admissible to prove a custom which is so obviously dangerous to life and limb as to be at once recognized as such by all intelligent persons. *Colf v. C., St. P., M. & O. R. Co.* 87 Wis. 273, so far as it conflicts herewith, overruled.
3. The act of a brakeman or yardmaster in riding upon the ladder on the side of a freight car in the course of switching operations is not so obviously dangerous as to preclude proof that it is customary.
4. Where the questions submitted for a special verdict covered all the material issues of fact, the refusal to submit other questions was not error.
5. Upon the question whether plaintiff was guilty of negligence which contributed proximately to the injury, it was error to charge the jury that "proximately" in that connection means materially or efficiently.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

This is an action to recover for personal injuries. The action was originally brought against the appellant and the Chicago, Milwaukee & St. Paul Railway Company as defendants, but upon the trial the plaintiff was nonsuited as to the railway company, and no appeal has been taken from that judgment.

It appeared by the testimony upon the trial that three railway companies operate yards and switch tracks at the cities of Neenah and Menasha, to wit, the Wisconsin Central, the Chicago, Milwaukee & St. Paul, and the Chicago & Northwestern, and that their various switch tracks are connected by a track owned by the Chicago, Milwaukee & St. Paul Company, but over which all the companies do switching, which track runs east and west on the south side of the United States canal, and is called the "lead track;" that just south of the lead track, and parallel therewith, is a switch track several hundred feet in length, called the "Menasha Paper Company track;" that this last-named track branches off from the lead track by a switch, and that the distance between the centers of the two tracks is eleven feet and three inches, except where the switch track approaches the lead track at the west end, where the distance gradually diminishes until the two tracks join at the switch; that the *Wilbur Lumber Company* has a yard where it receives logs from cars immediately south of the west end of the switch track, where the same approaches the lead track; that, at the time of the accident on which the suit was founded, the plaintiff was night yardmaster for the Wisconsin Central Railway at Neenah and Menasha, and had been such for a number of years; that on the morning of August 7, 1902, a switch crew in the employ of the Chicago, Milwaukee & St. Paul Railway placed a Chicago & Northwestern coal car or gondola car loaded with logs, and consigned to the appellant, on said switch track, and left it at a point where the tracks are eleven feet and three inches distant from center to

center; that during the day employees of the appellant moved this car westward on the switch track to a point where the switch track was approaching the lead track and the distance from center to center of the two tracks was but ten feet; that said employees commenced to unload the car at that point, and left it there when they quit work at night; that at about 2 o'clock on the following morning the plaintiff, with a switching crew, was engaged in switching certain cars, and approached the lead track from the west with a string of eleven or twelve freight cars, the engine being in front, and he being on the ladder on the south side of a woodenware car at about the middle of the train. Plaintiff claims that as the train went east upon the lead track, and was passing the switch track, he was knocked from the side of the car, owing to the close proximity of the gondola car, and was seriously injured. That he was injured at the time and place in question, there is no dispute, the other train employees testifying that they found him upon the ground at the point in question, moaning and seriously injured, and his lantern broken.

The jury returned the following special verdict:

"(1) Was the plaintiff injured at the time and place alleged in the complaint? *Answer.* Yes. (2) Was the defendant, through its employees, guilty of negligence in leaving the gondola car at the point upon the side track where the injury, if any, occurred? *A.* Yes. (3) If you answer the last question 'Yes,' then was such negligence on the part of the defendant the proximate cause of plaintiff's injury, if he was injured? *A.* Yes. (4) Was the plaintiff guilty of negligence which contributed proximately to the injury? *A.* No. (5) If the court should be of the opinion that the plaintiff is entitled to recover, at what sum do you assess his damages? *A.* $1,000."

Judgment for the plaintiff was rendered upon this verdict, and the *Wilbur Lumber Company* appeals.

For the appellant there was a brief by *Ryan, Merton & Newbury,* and oral argument by *E. Merton.*

For the respondent there was a brief by *Eaton & Weed* and *L. K. Eaton,* attorneys, and *Frederic J. Eaton,* of counsel, and oral argument by *L. K. Eaton.*

WINSLOW, J. The appellant claims that a verdict should have been directed in its favor upon the undisputed evidence. This claim is based upon the fact that the two tracks at their widest distance apart are but eleven feet and three inches from center to center, and that it appears from measurements of similar cars made by one of the witnesses that, even if the gondola car stood at the widest point, there would not have been room for a person riding where the plaintiff was riding to pass without injury. From these premises it is said that the appellant must be discharged, because it did not build the tracks, and because the moving of the gondola car by its employees did not increase the danger. The difficulty with the proposition is that the testimony as to the width of the cars and the distance between them is not undisputed. It is true that the witness Powrie measured a gondola car and a tall woodenware car, which, from *Boyce's* description, he thought were the same kind of cars that figured in the accident; and from these measurements it would appear that there was not sufficient room for such cars to pass with safety to one riding on the ladder at any point on the switch. But the difficulty is that the two cars themselves were never measured, and it cannot be said that it was conclusively shown that the cars which Powrie measured were of identical width with those in question. Again, there was considerable testimony that the cars in question were of the same width as ordinary cars, and that the distance between ordinary cars at the widest distance between the two tracks would be between twenty-two and twenty-three inches, whereas at the point where the accident occurred it would be but seven or eight inches. So it is clear that it cannot be said, as a matter of law, either that the accident would have hap-

pened in any event, wherever the cars stood, or that the plaintiff assumed the risk.

Testimony was admitted, under objection and exception, to the effect that it was customary for yardmasters and switchmen upon railroads to ride upon the ladders of freight cars while setting in and taking out cars from the switch tracks in the yards, and error is claimed in this ruling. The question as to the admissibility of evidence of customary methods of doing business, as bearing on the question of negligence, either original or contributory, has been much discussed, and the decisions even in this state are not entirely harmonious. Inasmuch as negligence ordinarily consists simply of lack of ordinary care, and ordinary care is that care which the great majority of people are accustomed to exercise under the same or similar circumstances, it was, in substance, held in *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671, that in determining whether an employer was negligent in furnishing an unsafe place to work, because of the proximity of uncovered machinery, the test was whether the defendant had come up to the standard of employers generally in the same business and under similar circumstances, and this test has been approved several times since that decision was rendered. *Innes v. Milwaukee,* 96 Wis. 170, 70 N. W. 1064; *Prybilski v. N. W. C. R. Co.* 98 Wis. 413, 74 N. W. 117; *Kreider v. Wis. River P. & P. Co.* 110 Wis. 645, 86 N. W. 662. While the question of the admissibility of evidence to show the usual or ordinary methods of others in the same business was not directly raised in these cases, it is very manifest that the legal principle adopted, and which must be considered as settled, necessarily calls for the admission of just such evidence; and in *Pier v. C., M. & St. P. R. Co.* 94 Wis. 357, 68 N. W. 464, it was said that the customary way of doing certain things in a railroad switch-yard was a fact proper to be considered in determining the question of negligence of an employee while doing those

things. In *Jochem v. Robinson,* 72 Wis. 199, 39 N. W. 383, and *Nadau v. White River L. Co.* 76 Wis. 120, 43 N. W. 1135, it was directly held that evidence of the customary manner of doing certain things was competent on the question of negligence of a party to the action, where the doing of those things was involved.

On the other hand, in the case of *Propsom v. Leatham,* 80 Wis. 608, 50 N. W. 586, where the question was whether a lumber dock was negligently defective, so as to be dangerous to employees, it was held that evidence as to how it compared with other docks used for the same purposes was incompetent; and in *Molaske v. Ohio Coal Co.* 86 Wis. 220, 56 N. W. 475, where the question was whether the defendant was negligent in employing a boy twelve years of age to give signals for the hoisting of coal buckets upon a coal dock, it was held that no custom or usage of employing boys of such tender years in such a position could be upheld. Again, in *Colf v. C., St. P., M. & O. R. Co.* 87 Wis. 273, 58 N. W. 408, where the question was whether a brakeman was negligent in jumping from a moving engine in the freightyard, it was held that evidence of a custom on the part of employees in the yard to jump from moving engines was not admissible; and in *Simonds v. Baraboo,* 93 Wis. 40, 67 N. W. 40, while the general rule that evidence of custom is admissible on the question of negligence was recognized, it was held that it was not admissible as to acts the manner of doing which is matter of common knowledge, and this rule was quoted approvingly in *Crouse v. C. & N. W. R. Co.* 104 Wis. 473, 80 N. W. 752. In *Dorsey v. Phillips & C. C. Co.* 42 Wis. 583, it was questioned whether a custom on the part of railway companies to locate structures so near the track as to be necessarily dangerous to employees could be held to excuse the danger, while in *Mulcairns v. Janesville,* 67 Wis. 34, 29 N. W. 565, evidence of a custom as to the bracing of cistern walls was held inadmissible because it was not spe-

cially directed to a cistern wall of the kind under consideration.

While these cases can hardly be considered as entirely in accord, it seems clear that the general rule that evidence of the general business custom is admissible upon the question of negligence is well recognized in this state, as stated in *Simonds v. Baraboo, supra,* but that it is subject to exceptions, among which are that it cannot be allowed to contradict common knowledge, nor is it admissible to prove a custom which is so obviously dangerous to life and limb as to be at once recognized as such by all intelligent persons. *Innes v. Milwaukee,* 96 Wis. 170, 70 N. W. 1064. Under this rule, all the cases cited may perhaps be substantially harmonized, unless it be the *Colf Case;* and, so far as that case disagrees with the conclusion now reached, it must be considered as overruled. It cannot be said that the act of a brakeman or yardmaster in riding on the ladder on the side of a freight car in the course of switching operations is such an obviously dangerous act as to preclude proof that it is customary. Therefore the evidence in question was properly received.

Exception was taken because the trial court refused to submit certain questions to the jury as part of the special verdict. We do not regard it necessary to set forth the questions at length. The questions of the verdict, framed by the court, which were actually submitted and answered, covered all the material issues of fact in the case, and hence there can be no error assigned upon the refusal to submit other questions.

A general objection is made to the charge on the ground that it was practically a general charge and informed the jury as to the effect of their answers to the questions of the verdict. It is sufficient, upon this contention, to say that it is entirely unwarranted. The trial judge carefully re-

frained from informing the jury in any way as to the effect of their answers upon the litigation.

In submitting the third question to the jury, the trial court defined "proximate cause" at length and with substantial accuracy, as it has been defined in the decisions of this court; but when he proceeded to the fourth question, touching the alleged contributory negligence of the plaintiff, he charged as follows:

"'Proximately,' in that connection, means materially, or was it one of the efficient causes which operated to produce the injury? This question, you will notice, gentlemen, is directed to the conduct of the plaintiff himself. Was the plaintiff guilty himself of negligence which contributed proximately to the injury? and, in answering the question above—the third question—you will necessarily have to consider this question more or less, because it is contended by the defendant that the plaintiff himself was guilty of negligence; that he knew, or ought to have known, that cars were liable to be upon this side track at any moment; and that he knew, or ought to have known, that it was dangerous for him to ride upon that ladder upon the side of the woodenware car, and that it was negligence upon his part to do so, and that such negligence did contribute to the injury; that, if it was not the primary and proximate cause, that it at least was a cause which contributed materially and proximately to the injury. Now, that is a question for you to determine from all the evidence—Was the plaintiff in the exercise of ordinary care and prudence in riding upon the side of this car, or, on the other hand, was he guilty of negligence in so doing?"

We cannot but regard this instruction as distinctly erroneous and prejudicial. The first sentence, to the effect that "proximately," in this connection, means materially or efficiently, is a clear and unmistakable intimation, if not a direct statement to the jury, that there is a difference between the meaning of the word when applied to the defendant and when applied to the plaintiff. There is no such differ-

ence. Contributory negligence on the part of the plaintiff must bear the same proximate relation to the result as the actionable negligence of the defendant. It need not be the sole cause, and it may contribute but slightly, but it must be a proximate cause in the same sense that the defendant's negligence must be proximate. This subject was fully discussed in *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816, and further discussion here is scarcely necessary. It is erroneous to define "proximate," in this connection, as meaning efficient or material, as has been repeatedly held by this court. There is but one safe way to define "proximate cause," and that way should be adopted when a definition becomes necessary. As indicated in *Mauch v. Hartford, supra,* the better form of question upon this subject is substantially as follows: "Did want of ordinary care on the part of the plaintiff contribute to produce the injury?" When this question is given, followed by proper instructions as indicated in the case last cited, there will be no error. It has been directly held that it is erroneous to charge a jury that the negligence of the plaintiff, in order to defeat the action, must "materially" contribute to produce the injury, because this instruction gives opportunity to the jury to say that, while it contributed slightly, it did not contribute materially, and thus the salutary rule that contributory negligence in any degree will defeat the plaintiff may be frittered away. *Ohio City F. S. Co. v. Boundy,* 122 Pa. St. 449, 15 Atl. 865; *Mattimore v. Erie,* 144 Pa. St. 14, 22 Atl. 817. We have found no other prejudicial errors.

By the Court.—Judgment reversed, and action remanded for a new trial.

McKENNEY, Guardian, and another, Respondents, vs. MINAHAN, Administrator, Appellant.

November 17—December 11, 1903.

(1-3) *Appeal: "Party aggrieved:" Executors and administrators: Extending time: Discretion.* (4-10) *Estates of decedents: Title to personalty: Presumptions: Pleading: Demurrer: Capacity to sue: Defect of parties.*

1. As to any order or judgment of the county court made in proceedings for the settlement of the estate of a deceased person adverse to such estate, and from which an appeal may be taken under sec. 4031, Stats. 1898, or the time for taking an appeal therefrom may be extended under sec. 4035, Id., the legal representative, whether administrator or executor, is a party aggrieved by force of the statute alone.
2. Upon principle, as to any judgment or order of a court adverse to one in a suit or proceeding, who is the proper representative therein, of the interests of others prejudiced by the result, that one is a party aggrieved, within the meaning of such term as used in appeal statutes.
3. An application to extend the time for taking an appeal under sec. 4035, Stats. 1898, is addressed to the sound discretion of the appellate court, and its decision in respect thereto cannot be reviewed except for clear abuse of discretion.
4. Upon the death of a person the title to his personal property becomes at once suspended and so remains till the appointment and qualification of a proper legal representative, whereupon it devolves upon him and can only pass on to another by some act referring to him as a necessary link in the chain of title.
5. A demurrer upon the ground of want of legal capacity to sue reaches only personal disability, as infancy, coverture, idiocy and the like, or want of title to the character in which the plaintiff sues; as in case of an executor or administrator not having complied with the statutory requisites to his qualification, or an assignee not having fully qualified as such, and the like. It does not deal with the sufficiency of the complaint as to stating a cause of action in favor of the plaintiff.
6. A demurrer for defect of parties plaintiff goes only to the subject of whether other persons should be brought in as such, not to the right of the one already in court.
7. When an heir at law seeks to recover personal property belonging to his ancestor at the time of the latter's death, it is essen-

tial to his right to recover, to show that title to the *res* was duly transferred to him by the legal representative of such ancestor.

8. Failure to plead the facts in regard to the transmission of property as last spoken of is not a matter to be reached either by demurrer for want of legal capacity to sue or for defect of parties plaintiff. The defect goes to the cause of action itself and can be raised at any time.

9. Want of evidence to show transmission of the title as above is not supplied by the doctrine that "all things are presumed to have been rightly and regularly done until the contrary is shown." The proper application of such maxim is as shown in the opinion.

10. In the trial of a cause between a claimant against an estate and the legal representative of the deceased, the fact that the latter does not defend upon all the grounds he has does not entitle the former to judgment in the absence of satisfactory proof of his claim.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Plaintiffs, as general guardian and guardian *ad litem* of John J. Minaghan, filed a claim in the matter of the settlement of the estate of John Minaghan, deceased, in favor of such minor, alleging that his mother, wife of the deceased, being possessed of $800 in money, gave the same to her husband in trust for her son, the same, with legal interest, to be paid to him or his guardian upon demand; that the mother predeceased her husband, and that the latter used the money in his business and died without executing the trust. Such proceedings were had in the county court that the claim was allowed in full. The administrator permitted the time absolutely given by statute for him to appeal, to elapse without improving the same. The circuit court, upon a showing deemed to be sufficient to warrant it, extended the time in that regard thirty days. Within such time the administrator appealed from the aforesaid decision to the circuit court for Calumet county.

On the trial in the appellate court the evidence was undisputed that John Minaghan, deceased, received from his wife the sum of $800 and used the same in his business. The jury found specially that no part of such money was given to the husband as his own. The court determined as matter of law from the undisputed evidence that no trust was created between the husband and wife in respect to the money, but that the relation of debtor and creditor between them in respect thereto was created; and that such relation existed at the time of Mrs. Minaghan's death. In answer to the motion of the administrator for judgment for the reason that the minor had shown no title to such indebtedness, there being no showing of an assignment thereof to him by the personal representative of his mother in the due course of the settlement of her estate, the court held that the objection went only to his legal capacity to sue, which was waived by not being raised by demurrer or answer; and further that, because of the lapse of time since the death of the mother, in the absence of evidence to the contrary there was a presumption of law which should prevail, that the title to the claim reached the minor in the regular course of the administration of the mother's estate, or that there were no claims against such estate and, there being no heirs except the minor in question, the title to the claim in question passed to him without the use of a personal representative of the mother. Judgment was rendered in effect affirming the decision of the county court, and the administrator appealed.

For the appellant there was a brief by *V. I. Minahan,* attorney, and *James H. McGillan,* of counsel, and a supplemental brief and oral argument by *Mr. Minahan.*

For the respondents there was a brief by *James Kirwan,* and oral argument by *B. W. Jones.*

MARSHALL, J. It is claimed on the part of respondents that the circuit court obtained no jurisdiction for two rea-

sons: First, because the administrator was not a party aggrieved within the meaning of the appeal statute (sec. 4031, Stats. 1898); and second, that he was not such a party within the meaning of sec. 4035, Id., respecting the enlargement of time for taking an appeal. It is a sufficient answer to the first of such reasons that sec. 4031 expressly recognizes an administrator standing as the representative of persons who would be injuriously affected by a determination of the county court, if it were allowed to stand, as a party aggrieved. That is the plain meaning of the language: "In all cases not otherwise provided for any executor, administrator, guardian, trustee or any person aggrieved," etc. Plainly, any one of the persons specially mentioned is recognized as a party aggrieved, when any one whose interest he represents is aggrieved. It was the duty of the administrator to preserve the property of the estate, so far as he legally could, for transmission to the heirs of the deceased. In the settlement of claims against the estate he stood for them. Any injury to their interests, in legal effect, was a grievance to him within the meaning of the appeal statute. That also answers the second contention, as it is obvious that the word "aggrieved" was used in sec. 4035 in the same sense as in sec. 4031. This answer might well be made to both contentions, that it is elementary that the legal representative of interests involved in litigation, prejudicially affected by the result, is a party aggrieved within the meaning of appeal statutes. 2 Ency. Pl. & Pr. 158, and cases cited.

The further point is made that no reasonable excuse was shown by the administrator for failing to appeal within the sixty days absolutely allowed therefor by the statute, hence that the circuit court possessed no power under sec. 4035 to extend the time for taking the appeal. The showing on the application for the extension presented to the circuit court fairly for consideration the subject of whether justice required a revision of the decision made by the county court.

That being so the court had jurisdiction to pass upon the matter, and whether the result reached was right or wrong does not necessarily involve jurisdictional error. The application was addressed to the discretionary power of the court, and the order granting the same could only be set aside for a clear abuse of such discretion. No such abuse, it seems, is shown. A strong case was made on affidavits to the effect that the administrator delayed investigating the claim of respondents and assuming an attitude of hostility thereto, upon the promise of the general guardian that it should be reduced $200; that such promise was made in bad faith, the only purpose thereof being to deter the administrator from acting by way of investigating the claim or appealing from the judgment rendered in the county court till the time for appealing should expire; and that by reason, in part, of his ignorance of such matters, and in part his want of knowledge that the claim had passed to judgment in the county court, such purpose was accomplished.

Respondents further claim that the trial court erred in holding that the evidence failed to show that a trust was created between the deceased and his wife in respect to the $800. We shall not take time to review the evidence on that point. Suffice it to say that we think the decision was clearly right. We are unable to find any evidence in the record to sustain any other reasonable theory than that Mrs. Minaghan loaned her money to her husband, creating the relation of debtor and creditor between them as the court found.

From what has been said it will be seen that the most that can be claimed for respondents, as regards the situation when Mrs. Minaghan died, is that her husband owed her the sum of $800 with legal interest thereon from the time he borrowed the same, and that the right to recover therefor passed to her personal representative upon her death, if one was appointed, and, if not, that such right was suspended by her death and remains in that condition unless by some means

it has passed to John J. Minaghan. The manner in which the learned circuit judge traced the title of the claim to John J. Minaghan notwithstanding there was no evidence of any administration of his mother's estate and assignment of the claim to him by her personal representative, cannot be approved. The judge said, in substance, that the defect was immaterial because it went only to the legal capacity of the claimant to sue, which was waived by failing to raise the question by answer or demurrer. That is wrong. If A. is sued by B., the latter cannot recover by showing that C. or some one has a ground of action against A. because the latter fails to raise the question of B.'s title to the cause of action by answer or demurrer, on the ground of want of legal capacity to sue. That must be plain. Want of legal capacity, within the meaning of sec. 2649, Stats. 1898, refers to personal disability, as infancy, idiocy, coverture, and the like, or to "want of title to the character in which the plaintiff sues" (Bliss, Code Pl. §§ 407, 408), as where an executor or administrator sues, not having complied with the statutory requisites thereto, or where an executor sues, not having proved the will under which he claims, or an assignee sues, not having first duly qualified as such. A defect going to the cause of action itself as regards the plaintiff, one showing that in no event and under no circumstances, and in no capacity, does the plaintiff own or represent the cause of action sought to be enforced, does not fall within the class of cases suggested. Such a defect comes under the sixth ground of demurrer in sec. 2649, Stats. 1898, that the complaint does not state facts sufficient to constitute a cause of action, and is not waived, of course, by failing to suggest it by answer or demurrer. Pomeroy, Code Rem. 203. In a recent case this court held in circumstances similar to those we have here, that failure to plead facts showing title to a claim under the personal representative of the deceased, is fatal to the right to recover. That, in effect, is a decision that such

a defect is not merely want of legal capacity to sue. *Buttles v. De Baun,* 116 Wis. 323, 93 N. W. 5. What is said upon this subject applies with equal force to a suggestion of the learned judge that the defect in the plaintiff's pleading, if any there be, falls within the fourth ground of demurrer, i. e., that there is a defect of parties plaintiff. Bliss, Code Pl. § 411. The defect reached under that ground of demurrer has regard to the necessity for other parties than those already before the court to be also brought into the litigation; not to a defect in the right of the plaintiff, already in court, to enforce the cause of action as regards his own interests therein. The trouble here is that the facts established by the evidence fail to show any cause of action whatever in which the minor, John J. Minaghan, in any capacity, has a legal, enforceable interest.

The rule which the learned circuit judge said should control, that from lapse of time, nothing appearing to the contrary, it will be presumed that the title to personal effects of a deceased person has passed to and vested in the heirs at law in the due course of administration of such person's estate, or so passed and vested without administration, none being needed because of there being no indebtedness to be provided for, we are familiar with, but do not understand that it has been adopted here or that it is the general rule. The learned court seems to have relied upon the familiar maxim: *Omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium,*—"All things are presumed to have been rightfully and regularly done until the contrary is shown." The illustrations of the proper application of the maxim given in the books will indicate how very far it comes from supplying want of proof that a cause of action in favor of one person has been conveyed to another who is attempting to enforce it, without connecting himself in any way with such other by some act competent to show a change of title from such other to him: A man acting in a public

capacity will be presumed to have been appointed and be duly authorized so to do; an officer acting within the scope of his authority is presumed to have acted honestly; the judgment of a court of competent jurisdiction on review is presumed to be right till shown to be clearly wrong; an officer in possession of an office and discharging its duties is presumed to be rightfully there till the contrary is shown; from rightful possession a legal title is presumed. Similar illustrations will be found, explaining the maxim under discussion, in Broom's Legal Maxims, p. 945. Clearly, none of such illustrations apply to the circumstances of this case to the effect given to the maxim by the trial court. If it were otherwise, any one could bring a suit upon a cause of action, which at one time accrued to another, and recover as regards a transfer to him of such right, upon the strength of the presumption that, from the assertion thereof by a person, it must be presumed till the contrary be shown, that he has legal ground therefor. It seems hardly necessary to discuss the proposition to show that it is fatally infirm.

The idea that the title to personalty can pass from a deceased person to his heirs or any one else without administration of such person's estate and a due assignment of the property by the personal representative of the deceased, or that such assignment, by lapse of time, in the absence of evidence to the contrary, can be presumed, is all wrong. It is elementary that by the common law, which prevails here on the subject, upon the decease of the owner of personalty the title is at once suspended and remains so till the proper official designation of a personal representative shall have been made and he shall have duly qualified as such, when it at once devolves upon him, and a transfer from him in due course of law is necessary to pass the title to another. 1 Woerner, Am. Law of Adm'n, *409, 430, 1241; *Murphy v. Hanrahan,* 50 Wis. 485, 490, 7 N. W. 436; *Estate of Kirkendall,* 43 Wis. 167, 179; *Smith v. Denny,* 37 Mo. 20; *Leamon v.*

McCubbin, 82 Ill. 263; *Hollowell v. Cole,* 25 Mich. 345; *Grider v. Phœnix B. Co.* 7 Ky. Law Rep. 594; *Hagthorp v. Hook's Adm'rs,* 1 Gill & J. 270; *Whit v. Ray* (4 Ired. L. 14) 26 N. C. 14; *Lockhart v. Cameron,* 29 Ala. 355. *Buttles v. De Baun,* 116 Wis. 323, 93 N. W. 5, really rules this case on the subject now under consideration, as it was there held, as we have seen, that one claiming a cause of action by title derived from the estate of a deceased person must show that such title came from the personal representative of such person in the due course of the administration of such person's estate. True, the idea that lapse of time might dispense with proof of such transmission of the title was not considered in that case; but, necessarily, since by common law rules—which prevail here as indicated, there being no statutory regulation on the subject—it is as essential that a personal representative shall transfer the title to a cause of action held by him as such, in order that it may vest in another, as it is for any person holding a cause of action in his own right to transfer it to another in order that such other may possess himself thereof, lapse of time can no more dispense with proof of the proper transfer in the one case than in the other. So it was held, in *Whit v. Ray,* that possession of intestate property by the heir at law, regardless of the length of the period such possession may have continued, will not of itself vest the legal title in the possessor. In *Estate of Kirkendall, supra,* RYAN, C. J., said, in discussing this subject:

"Personalty, except heirlooms or limbs of the inheritance which descend with it to the heir, is never inherited. Upon the owner's death, the legal title goes to the executor or administrator. . . . The title of the executor or administrator intervenes between testator and legatee, between ancestor and next of kin. Pending the administration of the estate, the legatee or next of kin has no title. His right is not *jus in re,* but only *jus ad rem,* suspended and dependent on the administration; a right to title from the executor or administrator, to what may remain upon settlement of the estate."

Justice LYON said, in an opinion in the same case:

"Personalty has no inheritable quality. It does not descend to the heir. The administrator takes the legal title and possession, and the next of kin has only the mere right to it, or to the proceeds of it, on distribution, after the estate is settled and debts and expenses of administration are fully paid."

That was emphasized by a reference to many authorities, some of which are cited here, where suits were brought upon choses in action or for personal property or its value, belonging to the estate, no administration having intervened, and a recovery was denied upon the ground that the plaintiff showed no title to the cause of action. In *Murphy v. Hanrahan,* 50 Wis. 485, 7 N. W. 436, after a full discussion of the subject, the cause of action being upon a promissory note possessed by a deceased person at the time of his death, there being no evidence of a transfer of the title to the plaintiff through the medium of a personal representative, the court said:

"The plaintiffs must obtain title to this note . . . if at all, through the administration of the estate of their father. Their recovery in this action would clearly be no bar to an action by the administrator, when appointed, who will have full title to the note."

True, some states have departed from this common-law rule, either with or without the aid of a statute, and have adopted, to some extent, the idea which the learned trial court in this case seems to have had in mind. Evidence of that can be found in the extensive note at section 200, 1 Woerner, Am Law of Adm'n. But the general rule in this country is in harmony with the common law, and is the rule here, as we have seen, by reference to the cases heretofore decided in this court.

It is said in the learned circuit judge's opinion, apparently as one of the reasons for denying appellant's motion for judgment, that the only question litigated was whether the right

amount of the plaintiff's claim was $600 or $800 for principal. We find that appellant endeavored, in the circuit court, to put the validity of the claim as a whole in issue by a formal answer, and that he was not permitted to do so. Why not does not clearly appear. However the respondents were bound to establish the cause of action or a claim in favor of the minor of some sort, recoverable against the estate, in order to entitle them to judgment. It was the right of the administrator, and his duty, to resist the claim. There was an entire failure of proof to establish it. Therefore the motion for judgment dismissing the same, with costs, should have been granted.

By the Court.—The judgment appealed from is reversed, and the cause is remanded with directions to enter a judgment in favor of appellant for costs.

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1. After the dismissal of an action had been ordered, under sec. 2811*a*, Stats. 1898, because it had not been brought to trial within five years after its commencement, it was an abuse of discretion to refuse to vacate such order when it was shown that plaintiff's attorneys agreed to a continuance over the last term within the five-year limit at the request and for the convenience of defendant's counsel; that counsel on both sides agreed to place the case on the calendar of the first term beyond the five-year limit; and that plaintiff's counsel thereafter consented to continuance over that term to accommodate defendant's counsel, but had duly noticed the case for trial at the next following term. *Hine v. Grant,* 332
2. No showing of merits in such a case was necessary, other than the verified complaint stating a cause of action. *Ibid.*

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1. Actual, continuous, exclusive possession of land by a person and his privies in estate for twenty years, unexplained, creates a presumption of fact that such possession and its commencement were characterized by all the requisites to title by

adverse possession, and that the title of the adverse claimant is perfect. *Illinois Steel Co. v. Jeka,* 122

2. Transfer of possession from one occupant to another may be by parol merely, without destroying the continuity of the adverse possession. *Ibid.*

3. The evidence in this case, though tending to show (by such facts as the execution of bills of sale of the house instead of deeds of the land) that the claim of defendant and his grantors was not at all times adverse, is *held* not to justify the court in taking from the jury the question of adverse possession. *Ibid.*

4. Upon evidence tending to show open, exclusive, continuous, uninterrupted, and hostile use and occupation of land for the statutory period by defendant and his grantors and predecessors, it is *held* that it was a question for the jury whether such occupation was under claim of title exclusive of any other right so as to constitute adverse possession. *Illinois Steel Co. v. Budzisz,* 580

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APPEAL AND ERROR.

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1. Pending an appeal from a justice's judgment to the superior court, the latter court, upon motion of the appellant, made an order vacating the judgment. The motion papers and order were entitled in the action. *Held,* that the order was nevertheless one made in a special proceeding, and, being a final order affecting, at least, the substantial right to have a transcript of the judgment docketed, was appealable under subd. 2, sec. 3069, Stats. 1898. *Deuster v. Zillmer,* 402

Who may appeal: "Party aggrieved." See APPEAL, 20.

2. Upon principle, as to any judgment or order of a court adverse to one in a suit or proceeding, who is the proper representative therein, of the interests of others prejudiced by the result, that one is a party aggrieved, within the meaning of such term as used in appeal statutes. *McKenney v. Minahan,* 651

3. A foreclosure judgment, entered by default, ordered that plaintiff have judgment for any deficiency against the executor of the will of the mortgagor. Immediately after the foreclosure sale, said executor appeared and prayed that said order for judgment for deficiency be held inoperative, on the ground that there was no personal liability on the mortgage note at the time of the commencement of the action. The court ordered the judgment for deficiency to be entered. *Held,* that the executor was entitled to appeal from such order and judgment. *Pereles v. Leiser,* 347

Exceptions and objections in trial court.

4. A general exception to the whole of a certain part of the charge to the jury is unavailing if any distinct and independent prop-

osition covered by such exception is correct. *Richardson v. Babcock*, 141

5. An objection to the jurisdiction of a justice, not alleged in the petition to the circuit court for a writ of *certiorari*, but urged for the first time on appeal from the circuit court to this court, will not be considered. *Holz v. Rediske*, 563

Briefs.

6. Failure of a brief to give any reference to the place in the record where the evidence or transaction as to which error is assigned can be found, is in direct violation of Supreme Court Rule VIII. *Meehan v. State*, 621

7. Counsel are not justified in alleging errors which they cannot support by any argument. *Ibid.*

Review: Decision on former appeal. See NEGLIGENCE, 6.

8. A decision of this court upon a former appeal, upon substantially the same record, that the exclusion of certain evidence, if erroneous, was not prejudicial, is the law of the case on the second appeal. *Eggett v. Allen*, 625

Same: Questions of fact. See EVIDENCE, 5. INSURANCE, 11.

9. If a finding of the jury is supported by any credible evidence it must be regarded on appeal as a verity. *Wis. Farm Land Co. v. Bullard*, 320

10. A decision of the trial court refusing to set aside a verdict or alter a finding therein as being unsupported by the evidence will not be disturbed on appeal unless clearly wrong. *Bohn v. Racine*, 341

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11. Judgment affirmed upon an equal division of the justices of this court participating in the hearing and decision. *State ex rel. Dietrich v. Patterson*, 52

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12. Striking out a statement volunteered by a witness on cross-examination is not a material error where the same statement made on the direct examination was not stricken out. *Butler v. Davis*, 166

13. Error in admitting evidence to show that plaintiff was estopped to insist upon a certain contract obligation is immaterial where the jury has found upon sufficient evidence that plaintiff released defendant from that obligation. *Wis. Farm Land Co. v. Bullard*, 320

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14. Where the trial court changed a special verdict and rendered judgment accordingly, this court, on reversing the judgment upon the ground that such change was unwarranted, may, under sec. 3071, Stats. 1898, remand the cause for a new trial. *Blohowak v. Grochoski*, 189

15. Where defendant moved in the trial court for judgment notwithstanding the verdict and it appears, on appeal, that the motion should have been granted, this court, on reversing the judgment for plaintiff, will direct the entry of judgment for the defendant. *Sheehy v. Duffy*, 89 Wis. 6, holding that the

defendant cannot move for judgment notwithstanding the verdict, overruled. *Muench v. Heinemann*, 441

16. Where evidence as to a controlling fact was all received by the trial court and appears in the bill of exceptions, although, after being received, it was stricken out as inadmissible by the trial court, which accordingly held that there was no evidence to show such fact, this court, upon holding such evidence admissible, will examine it and, if it establishes said fact with reasonable certainty, will so decide and will direct the trial court to act in accordance with that decision, especially where there is no probability that the evidence would be different upon a retrial. *Lippincott v. Lawrie*, 573

17. Where facts essential to the determination of the rights of the parties have not been found by the trial court and cannot be ascertained from the record on appeal, the cause will be remanded for further trial and findings as to such facts. *Fischbeck v. Mielenz*, 27

18. A judgment for costs being rendered in form in favor of two defendants jointly, one being entitled to such judgment and the other not, on appeal therefrom, there being no disclosure in the record enabling the court to adjust the rights of the parties in respect thereto, the entire judgment must be reversed and the cause remanded for a proper judgment. *Kriz v. Peege*, 105

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19. Where a cause is remanded by the supreme court to the circuit court with direction to grant a motion of the appellant upon performance of the conditions indicated "within a reasonable time, to be fixed by the circuit court," the latter court cannot, without having fixed such reasonable time, refuse to grant said motion upon the ground that appellant has been guilty of laches in making it or in complying with the conditions imposed by the supreme court. *Bloor v. Smith*, 163

Appeal from county court.

20. As to any order or judgment of the county court made in proceedings for the settlement of the estate of a deceased person adverse to such estate, and from which an appeal may be taken under sec. 4031, Stats. 1898, or the time for taking an appeal therefrom may be extended under sec. 4035, Id., the legal representative, whether administrator or executor, is a party aggrieved by force of the statute alone. *McKenney v. Minahan*, 651

21. An application to extend the time for taking an appeal under sec. 4035, Stats. 1898, is addressed to the sound discretion of the appellate court, and its decision in respect thereto cannot be reviewed except for clear abuse of discretion. *Ibid.*

22. Refusal to dismiss an appeal duly taken from the county court, merely because the record and appeal papers were not transmitted to the circuit court within the time limited by sec. 4033, Stats. 1898, was not error, in view of the authority given by sec. 2831 to allow such transmission after the time so limited, especially where the motion to dismiss was not made until after the papers had been transmitted and was based solely on the ground that the appeal "was not taken in due time or according to the provisions of the statutes." *Hanley v. Kraftczyk*, 352

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ASSAULT.

1. In an action by a female for an indecent assault upon her, evidence of specific acts to show her bad character as to chastity cannot go beyond acts of lewdness which quite necessarily evince looseness in sexual morals; hence, in such a case, evidence that on certain occasions she had purchased beer was properly excluded. *Barton v. Bruley,* 326
2. The commission of one assault cannot be established by proof of the commission of others; and in a civil action for an indecent assault upon a female, the defendant's character is in no wise in issue. *Ibid.*
3. Improper conduct of the plaintiff's attorney in an action for an indecent assault, in persistently putting questions to defendant, on cross-examination, as to prior assaults of a similar nature upon other females, obviously intended to lead the jury to believe that defendant was an habitual debaucher of women, and errors of the court in overruling objections to some of such questions, are *held* to render necessary a reversal of a judgment in favor of the plaintiff. *Ibid.*
4. Instructions informing the jury that the evidence as to plaintiff's character and reputation for chastity was material as bearing upon the probability of an assault having been committed upon her, and impliedly excluding its relevancy upon the question of damages, are *held* open to criticism; but whether, in the absence of any request by counsel calling the trial court's attention to the defect or omission, a reversal should follow, is not determined. *Ibid.*

ASSESSMENTS. See MUNICIPAL CORPORATIONS, 6–8.
ASSIGNMENT of judgment. See JUDGMENT, 5.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See JUDGMENT, 4.

1. The bond given by an assignee for the benefit of creditors is not an official bond, within the meaning of sec. 986, Stats. 1898. *Ringenoldus v. Abresch,* 410
2. The statutes (secs. 1698, 1700, Stats. 1898) relating to the filing of claims against the assignor have no application to an indebtedness incurred by the assignee in executing the trust. *Ibid.*
3. An action upon the bond of an assignee for breach thereof in restoring the property to the assignor before payment of an indebtedness incurred by the assignee in executing the trust, does not in any way attack an order discharging the assignee from all obligations as such to creditors of the assignor, especially where such order expressly required that the expenses of exe-

cuting the trust be paid by the assignor as a condition precedent to the restoration of the property. *Ibid.*

4. Such partial or conditional discharge of the assignee did not relieve him or the sureties on his bond from liability in respect to the breach mentioned. *Ibid.*

5. An attempt to collect the debt, so incurred by the assignee, from the assignor, who had agreed with the assignee to pay the same, was not such an election to rely upon the assignor's liability as would discharge the assignee. *Ibid.*

6. The question whether the sureties on the assignee's bond would be bound by his contracts in carrying on the assigned business by order of the court, is not involved or determined. *Ibid.*

7. Sec. 1701, Stats. 1898, providing for restoration of the property to the assignor only upon payment by him of the expenses of executing the trust, was intended not merely for the protection of the assignee, but also for the protection of persons who, by reason of dealings with the assignee, were entitled under sec. 1700 to liens upon the property. *Ibid.*

8 Where a person to whom the assignee had become indebted in executing the trust, and who was entitled to a lien upon the assigned property for the amount of his claim, assented to the restoration of the property to the assignor without permission of the sureties on the assignee's bond, such sureties were thereby released from liability for the claim. *Ibid.*

9. Assent of the claimant to the restoration of the property, in such a case, was sufficiently evinced by his conduct, where, after being notified that the assignee had released the property and taken an indemnity bond from the assignor to secure payment of the claim, he made no further effort to obtain payment in the assignment proceedings, but attempted to enforce the agreement of the assignor, making no claim against the assignee's bondsmen until several years later. *Ibid.*

ASSISTANTS. See OFFICERS, 1.

ASSUMPTION OF RISK. See MASTER AND SERVANT, 5.

ATTORNEYS AT LAW.

See ASSAULT, 3. LIMITATION OF ACTIONS. WITNESSES, 2.

A finding of the trial court that attorneys who were acting for plaintiff's wife in negotiating a settlement with him had represented to him that they were acting as his attorneys in the matter, and that he relied upon them to protect his interests and legal rights, and a further finding that they had conspired with the wife to cheat and defraud plaintiff of his property, are *held* to be contrary to a clear preponderance of the evidence. *Burnham v. Burnham*, 509

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In an action by a real-estate broker to recover a commission on a sale of land made by the owner, the jury found that the plaintiff was the procuring cause of the sale, and also that plaintiff had released the defendant from the obligation to pay a commission in case he sold the land himself. *Held*, that the finding that plaintiff was the procuring cause meant no more than that plaintiff directed the attention of the purchaser to the land and that this was what led up to the sale; and that such fact did not entitle plaintiff to a commission, in view of the subsequent release which left defendant free to deal with such purchaser. *Wis. F. L. Co. v. Bullard*, 320

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CHASTITY: Evidence. See ASSAULT, 1.

CHATTEL MORTGAGES.

See PLEADING, 6.

1. A chattel mortgagee holds the legal title to property involved, qualified by the mortgagor's right to redeem the same at any time before he shall have made default and the property shall have been reduced to the former's possession. *Illinois T. & S. Bank v. Alex. Stewart L. Co.* 54
2. A chattel mortgagor in possession is the general owner of the property involved, his ownership resting upon the equitable right to clothe himself with the full legal title. *Ibid.*
3. The title of a mortgagee, though legal, is in fact special, in that till the right of redemption is extinguished his property interest is limited to the amount due upon the indebtedness. *Ibid.*
4. While the general property of a chattel mortgagor in the chattels involved continues, he may sell or mortgage the same, conveying a good title thereto, subject to the primary incumbrance. *Ibid.*
5. While the title of a chattel mortgagee remains subject to the right of redemption, if the property involved be converted by the mortgagor or any one else having an equitable right to the same, subject to the mortgagee's special property therein, the measure of the former's recovery of damages is the amount due and unpaid upon the mortgage indebtedness. *Ibid.*

6. A vendee of a chattel mortgagor upon being called upon to pay off the mortgage indebtedness, is entitled to have applied thereon all sums of money paid upon the same out of the proceeds of property covered by the mortgage, that has been converted into money, whether included in the sale to such vendee or not, and is entitled to be subrogated to the rights of the mortgagee in any other security he may have for the payment of the mortgage indebtedness, to save him from loss, there being no superior equities. *Ibid.*

7. If the mortgagor of chattels without the consent of the mortgagee confuses the same with other property of the same character belonging to a third person, and the latter, by consent of such mortgagor, converts the common property into money knowing the facts, actually or constructively, such third person is liable to the mortgagee as for money had and received, but only to the extent of the sum due upon the mortgage indebtedness, he having a right to the benefit of all other mortgage security to save himself against loss, as before stated, there being no superior equity. *Ibid.*

8. If in the event last mentioned the third person pays to the mortgagee a sum of money out of the proceeds of all or a part of the mortgaged property to apply upon the mortgage indebtedness, he is entitled to have the same applied thereon regardless of any agreement such mortgagee and the mortgagor may make to which he is not a party. *Ibid.*

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See ATTORNEYS AT LAW. INSURANCE, 4.

It appearing that plaintiff expressed his approval of a settlement with his wife whereby he conveyed to her a half interest in his real property; that during three or four months thereafter he fully understood the terms of the settlement and treated the matter as satisfactorily arranged and concluded; and that, after taking counsel as to his right to have the agreement and deed set aside for fraud, he nevertheless insisted upon having a mortgage of the property executed by himself and his wife, pursuant to the terms of the settlement, for the purpose of paying his debts, it is *held* that he thereby ratified the settlement and waived any right to revoke or annul it. *Burnham v. Burnham*, 509

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Limitations on municipal indebtedness.

1. The rule that municipal revenues in process of collection should be counted against indebtedness in determining whether the constitutional limit in that regard has been exceeded, does not authorize offsetting taxes voted or levied till the same shall have been duly spread upon the tax roll and that placed in the hands of the proper municipal officer with authority to collect the tax. *Balch v. Beach,* 77
2. A provision of law authorizing the issuance of municipal warrants upon the corporate treasury, where a fund for payment of indebtedness has been voted, treats only of power to issue evidence of established liabilities, not of that to incur indebtedness. Such warrants are merely evidence, *prima facie,* of the existence of indebtedness established and ready for payment, and are counted as such in solving whether the constitutional limitation in that regard has been reached. *Ibid.*
3. Municipal indebtedness in excess of the constitutional limitation cannot be made good by ratification, since power to authorize originally is a condition precedent to the power to ratify subsequently. *Ibid.*
4. Municipal indebtedness void at law because in excess of the constitutional limitation is void in equity, all persons dealing with the municipal corporation being presumed to know the limits of its power. *Ibid.*

CONTRACTS.

See BROKERS. CHATTEL MORTGAGES. COMPROMISE. DEEDS. EVIDENCE, 2. INSURANCE. LANDLORD AND TENANT. MARRIED WOMEN. MASTER AND SERVANT, 1-4. MORTGAGES. MUNICIPAL CORPORATIONS, 1-5. PAYMENT. PRINCIPAL AND AGENT. TELEGRAPH COMPANIES.

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1. The complaint alleged that plaintiff executed and placed in the custody of one of the defendants a deed conveying his undivided interest in certain land, upon their promise to obtain from the grantee for him a certain sum to be applied upon judgments against him; that defendants failed to obtain such money; and that, through insolvency of the grantee and a conveyance of the land to an innocent purchaser, plaintiff has

lost his interest in the land, to his damage in the sum mentioned. Plaintiff testified to the making of such promise, and the other facts were undisputed. *Held*, that it was error to direct a verdict in favor of defendants on the ground that the evidence failed "to show any trust reposed in the defendants." *Morton v. Smiley*, 156

Public policy. See RAILROADS, 3.

Capacity to contract. See DEEDS, 2. MARRIED WOMEN.

Statute of frauds. See LANDLORD AND TENANT.

Upon whom binding: Successors in interest. See STREET RAILWAYS, 1-3.

For benefit of third person. See RAILROADS, 4.

Entire contracts. See MASTER AND SERVANT, 1-3. SALES, 3.

Construction and operation. See BROKERS. INSURANCE. MASTER AND SERVANT, 1-4. SALES.

2. Where a building contract fixes no time for the completion of the work, a reasonable time is to be regarded as being within the contemplation of the parties; and what is a reasonable time depends upon all the circumstances of the particular case. *Lang v. Menasha Paper Co.* 1

3. In a contract to drill a well there is no implied undertaking that water shall be obtained, or that the well shall be a success as to quantity or quality of the water obtained, but only that the work shall be done in a workmanlike manner and with ordinary skill. *Butler v. Davis*, 166

4. One who agreed to board a well-driller and helper while they were drilling a well for him cannot recover for any part of the board furnished during such drilling, as being in excess of the agreement, if there was no contract as to the time the drilling would take and the work was not negligently prolonged. *Ibid.*

5. Plaintiffs contracted to insert defendant's advertising cards in a certain number of cars on certain street railways "for the term of twelve months from July 10, 1900." Defendant was to pay therefor $470 per month—"the rent each month to be paid in advance;" and the contract provided that "nonuse of space from advertiser's act or omission is advertiser's loss." The cards were to be subject to the approval of plaintiffs and of the railway companies. Prior to July 10, 1900, plaintiffs procured the insertion of the cards as agreed, but it appears that no particular space in particular cars was secured by them for the term of the contract. On September 27, 1900, defendant directed plaintiffs to remove the cards from all cars, but plaintiffs refused, and continued the insertion of the cards up to July 10, 1901. *Held*, that the contract was not in the nature of a lease or subletting of certain spaces in the cars, but rather in the nature of a contract for personal services. It was therefore not fully executed on July 10, 1900, when plaintiffs had procured the insertion of the cards, but was still executory at the time when defendant directed their removal. *Ward v. Am. Health Food Co.* 12

6. The contract being executory, defendant had the right, by giving such notice, to stop further performance by plaintiffs, and

thereby limited its further liability to damages for its breach of the contract. *Ibid.*

7. In an action upon the contract, in which plaintiffs did not allege such breach or damages therefrom, but sought to recover the full contract price on the theory of full performance, it is *held* that they cannot recover damages for such breach, but only those monthly instalments of the contract price which had been earned or partially earned before the contract was terminated by defendant. *Ibid.*

Modification by parol. See EVIDENCE, 6.

Setting aside for fraud. See DEEDS, 1.

Reformation for mistake. See REFORMATION.

Release. See BROKERS.

CONTRIBUTORY NEGLIGENCE. See MASTER AND SERVANT, 5. MUNICIPAL CORPORATIONS, 12, 13. NEGLIGENCE, 9–11. RAILROADS, 8, 10, 11.

CONVERSION. See CHATTEL MORTGAGES, 5–8. LOGS AND TIMBER. WATERS, 2.

CONVEYANCES. See ADVERSE POSSESSION, 2. COMPROMISE. CONTRACTS, 1. DEEDS. HUSBAND AND WIFE. PERPETUITIES. RAILROADS, 1, 2. TAX TITLES.

COPIES.
As evidence. See EVIDENCE, 4.
Service. See LIENS, 6.

CORPORATIONS.

By-laws: Adoption, etc.

1. A set of by-laws for a corporation, approved at a stockholders' meeting before the articles of incorporation had been recorded, and thereafter, though never formally adopted in accordance with said articles by the board of directors, treated by such board as the by-laws during the existence of the corporation, will be deemed in law to have been the by-laws of the corporation. *Graebner v. Post,* 392

Calls on stock subscriptions: Waiver of irregularities: Setoffs.

2. One who, as a stockholder, director, and president of a corporation, participated in all the proceedings relating to the making and ratifying of calls on stock subscriptions and prescribing the notice to be given thereof, and who received notice of a call, gave his note for the amount due from him thereon, and afterwards presided at a meeting of the directors at which it was voted to apply upon the amount due from him on said calls moneys advanced by him for the corporation,—all without objection on his part that the call was irregular or illegal,—waived thereby any irregularity in said call or the notice thereof, and is estopped to question their validity. *Graebner v. Post,* 392

3. Where the president of a corporation employed counsel to represent it in threatened litigation, before action had been taken to have the corporation declared insolvent and a receiver appointed, and advanced moneys to pay such counsel because no other funds were then available, and such acts were either authorized or ratified by the board of directors, which voted that credit be given him upon an unpaid call upon his stock subscription, the advances so made were a proper setoff in an ac-

tion brought upon said call by a receiver subsequently appointed for the corporation. *Ibid.*

Expulsion of members: Charges: Trial, etc. See INSURANCE, 14, 15.

4. Where the by-laws of a corporation give the board of directors power to try any member of the corporation upon charges made in a prescribed manner, and to censure, suspend, or expel him if he be found guilty, a court of equity will not interfere to prevent the exercise of such jurisdiction, upon the mere assumption that the board, if permitted to exercise it, will commit jurisdictional error or will deny to the accused a fair trial. *Bartlett v. L. Bartlett & Son Co.* 116 Wis. 450, distinguished. *Wood v. Chamber of Commerce,* 367
5. The sufficiency of the charges in such a case is a matter to be determined in the first instance by the trial board. *Ibid.*
6. Mere indefiniteness in the charges is not a ground for the interference of a court of equity, since the trial board itself has ample power to enforce the right of the accused to have them made specific, and will presumably do so. *Ibid.*
7. By-laws of a chamber of commerce organized "to promote just and equitable principles in trade," giving its board of directors power to censure, suspend, or expel any member found guilty of certain offenses, described in language not limited as to place or as to the other persons concerned therein, are *held* to cover and apply to conduct of the nature specified on the part of members in their dealings with nonmembers and outside of the local jurisdiction of the corporation. *Ibid.*
8. By-laws of a corporation making it the duty of the board of directors to examine all charges against any member of the corporation made in the prescribed manner by any other member or members, do not preclude members of the board from making such charges or from taking part in the trial of a member upon charges made by themselves. *Ibid.*

COSTS.

See APPEAL, 18. INFANTS.

1. In an action upon contract, although defendant interposed an equitable counterclaim for reformation of the instrument, plaintiffs are *held* entitled to recover only the costs allowable under the statutes in actions at law on contract. *Ward v. Am. Health Food Co.* 12
2. The taxing officer cannot refuse to tax costs for findings drawn under the direction of the trial judge, on the ground that they are voluminous. *Lentz v. Eimermann,* 492

COUNTERCLAIM. See COSTS, 1. INSURANCE, 2.

COUNTY BOARD: School taxes. See TAXATION, 4–8.

COUNTY COURT. See APPEAL, 20–22. EXECUTORS.

COURT AND JURY. See ADVERSE POSSESSION, 3, 4. MALICIOUS PROSECUTION, 4. MASTER AND SERVANT, 5, 7, 15. NEGLIGENCE, 7. RAILROADS, 7–9. STREET RAILWAYS, 4, 7. TRIAL, 10. WATERS, 3.

COVENANTS running with land. See STREET RAILWAYS, 3.

CREDIBILITY of witnesses. See WITNESSES, 3–5.

CREDITORS' REMEDIES. See ASSIGNMENTS. CHATTEL MORTGAGES. CONSTITUTIONAL LAW, 4. EXECUTORS, 2, 3. GARNISHMENT. INSURANCE, 12. JUDGMENT, 4, 5. LIENS. MUNICIPAL CORPORATIONS, 5. TRUSTS, 4. WILLS, 12, 13.

CRIMINAL LAW AND PRACTICE.

Information: Amendment.

1. An information charging robbery of a silver watch may be amended at the trial by changing the word "silver" to "gold." *Meehan v. State,* 621

Instructions to jury: Defining reasonable doubt.

2. Refusal to give a requested instruction is not error where the subject was fully and exhaustively covered in the instructions given. *Meehan v. State,* 621
3. Omission of the trial court, in the exercise of its discretion, to give to the jury a definition of reasonable doubt, is not error, especially where there was no requested instruction giving any definition. *Ibid.*

Review in appellate court: Immaterial errors.

4. Error in permitting amendment of a count in an information is not prejudicial where the accused was not convicted on that count. *Meehan v. State,* 621
5. Error in excluding testimony as to a fact in response to one question is cured by permitting the same witness to testify to that fact immediately afterward in response to another question. *Ibid.*

CROSS-EXAMINATION. See APPEAL, 12. EVIDENCE, 2. WITNESSES, 5.

CUSTOM AND USAGE. See INSURANCE, 13. NEGLIGENCE, 8, 9.

DAMAGES.

See CHATTEL MORTGAGES, 5. CONTRACTS, 6, 7. MALICIOUS PROSECUTION, 7. MASTER AND SERVANT, 3. TELEGRAPH COMPANIES.

1. In an action for injuries which disabled plaintiff from attending to his regular business, it was not error to permit him to state what were the customary profits of the business, as against an objection that the books were the best evidence, especially where the charge to the jury was correct and did not allow the loss of profits as an element of damage; although, had proper objection been made, the court should, perhaps, have required that proof be first made of the size and character of the business and the quality and amount of the plaintiff's services therein—all of such facts being admissible merely as tending to show plaintiff's earning capacity. *Muench v. Heinemann,* 441
2. An instruction that under certain circumstances the jury were "authorized" to award punitory damages was strictly correct and did not carry the implication that such damages must be awarded; but it would have been better had the jury been more clearly informed that the matter was in their discretion. *Eggett v. Allen,* 625
3. Wantonness or an aggravated degree of malice is not necessary to justify an award of punitory damages for a malicious prosecution; but such damages may be given where plaintiff recovers

at all, at least where the prosecution was begun or actively carried on by the defendant himself and was not the unauthorized or unratified act of an agent. *Ibid.*

4. An award of $1,000 damages for malicious prosecutions upon charges of embezzlement and of obtaining money under false pretenses, is *held* not excessive. *Ibid.*

5. In an action based upon the unjustifiable acts of defendant's employee in locking plaintiff in a room and searching her for stolen goods, where there was no physical violence and no circumstances of public disgrace or insult, and, though the evidence tended to show that plaintiff suffered from heart difficulty, weakness, and headache as the result of the occurrence, she testified that she could do her own housework and that she was not "nearly so bad as at first," a verdict for $2,500 is *held* excessive, and it is said that upon such evidence any verdict exceeding $1,000 would be so regarded. *Cobb v. Simon,* 597

DEATH by negligence. See LIMITATION OF ACTIONS. RAILROADS, 5–8. STREET RAILWAYS, 7.

DEBTOR AND CREDITOR. See ASSIGNMENTS. CHATTEL MORTGAGES. CONSTITUTIONAL LAW. EXECUTORS, 2, 3. GARNISHMENT. INSURANCE, 12. JUDGMENT, 2–5. LIENS. MARRIED WOMEN. MORTGAGES. MUNICIPAL CORPORATIONS, 5, 14–16. PAYMENT. PRINCIPAL AND SURETY. TRIAL, 7. TRUSTS, 4. WILLS, 12, 13.

DECLARATIONS. See EVIDENCE, 4.

DEEDS.

See COMPROMISE. HUSBAND AND WIFE. PERPETUITIES, 5. RAILROADS, 1, 2. TAX TITLES. WILLS, 9, 10.

1. A deed or contract should not be set aside for a fraud in fact unless such fraud is proven by clear and satisfactory evidence. *Burnham v. Burnham,* 509

2. A person addicted to the habitual and excessive use of intoxicating liquor is not incompetent to contract and convey property unless his reason is dethroned by actual intoxication or his understanding so impaired as to render him mentally unsound when the act is performed. *Ibid.*

DEFICIENCY, JUDGMENT FOR. See MORTGAGES, 3.

DEFINITIONS. See CRIMINAL LAW, 3. WORDS AND PHRASES.

DEMURRER. See DESCENT, 3. PLEADING, 4, 5.

DEPUTIES. See OFFICERS, 1.

DESCENT AND DISTRIBUTION.

1. Upon the death of a person the title to his personal property becomes at once suspended and so remains till the appointment and qualification of a proper legal representative, whereupon it devolves upon him and can only pass on to another by some act referring to him as a necessary link in the chain of title. *McKenney v. Minahan,* 651

2. When an heir at law seeks to recover personal property belonging to his ancestor at the time of the latter's death, it is essential to his right to recover, to show that title to the *res* was

duly transferred to him by the legal representative of such ancestor. *Ibid.*

3. Failure to plead the facts in regard to the transmission of property as last spoken of is not a matter to be reached either by demurrer for want of legal capacity to sue or for defect of parties plaintiff. The defect goes to the cause of action itself and can be raised at any time. *Ibid.*

4. Want of evidence to show transmission of the title as above is not supplied by the doctrine that "all things are presumed to have been rightly and regularly done until the contrary is shown." The proper application of such maxim is as shown in the opinion. *Ibid.*

DISCRETION. See ACTION, 1. APPEAL, 21. CRIMINAL LAW, 2, 3. EXECUTORS, 1. MUNICIPAL CORPORATIONS, 1. PLEADING, 6. TRUSTS, 1-3.

DISMISSAL for want of prosecution. See ACTION, 1, 2.

EJECTMENT. See ADVERSE POSSESSION. TAX TITLES, 3, 4.

ELECTION between remedies. See ASSIGNMENTS, 5, 9. CONTRACTS, 6, 7. MASTER AND SERVANT, 3.

ELECTIONS. See OFFICERS.

ENTIRE CONTRACTS. See MASTER AND SERVANT, 1-3. SALES, 3.

ENTIRETIES, Tenancy by. See HUSBAND AND WIFE.

EQUITY.

See CHATTEL MORTGAGES. CONSTITUTIONAL LAW, 4. CONTRACTS, 1. CORPORATIONS, 4-6. COSTS, 1. DEEDS, 1. JUDGMENT, 2, 3. LANDLORD AND TENANT. MORTGAGES. MUNICIPAL CORPORATIONS, 5, 14-16. REFORMATION. TRADEMARKS. TRUSTS.

Equity suffers no wrong to exist without a remedy, the injury being sufficient to be appreciated by the conscience of the chancellor, and its jurisdiction being invoked seasonably and with clean hands. *Balch v. Beach*, 77

ESTATES OF DECEDENTS. See DESCENT. EXECUTORS. WILLS.

ESTOPPEL. See APPEAL, 13. CORPORATIONS, 2. GARNISHMENT, 2. INSURANCE, 3. MASTER AND SERVANT, 4. MUNICIPAL CORPORATIONS, 8, 11. PLEADING, 2. WILLS, 10.

EVIDENCE.

Presumptions and burden of proof. See ADVERSE POSSESSION, 1. DESCENT, 2, 4. EXECUTORS, 3. MUNICIPAL CORPORATIONS, 12. WILLS, 3-5.

Relevancy, materiality, and competency. See ASSAULT, 1, 2. DAMAGES, 1. GUARDIANS, 8. MALICIOUS PROSECUTION, 1, 5. WILLS, 11.

1. Where an entire conversation between parties related to the subject matter of the controversy, though a part thereof was somewhat remote in its bearing, it was all properly admitted in evidence. *Richardson v. Babcock*, 141

2. The question being whether a certain mortgage had been received by plaintiff in full payment and satisfaction of defendant's liability on a judgment against him and others, defendant should have been allowed to elicit from plaintiff, on cross-

examination, the negotiations and conversations actually had with him concerning the payment and satisfaction of said judgment, and what took place when securities and property were deposited and conveyed by him to apply on the liability. *Meyer v. Hafemeister*, 539

Res gestæ. See NEGLIGENCE, 4.

Custom and usage. See NEGLIGENCE, 8, 9.

Admissibility under pleadings: Variance. See PLEADING, 2.

Admissions. See TAX TITLES, 3.

3. In an action against partners for personal injuries caused by the falling of a pulley in an elevator in their building, evidence of statements made by one of the defendants, in the nature of admissions as to the way in which the accident was caused and the manner in which the pulley was attached to the ceiling, was admissible as against all the defendants. *Muench v. Heinemann*, 441

Declarations. See WILLS, 6.

Best and secondary evidence: Certified copies.

4. In an action upon a life insurance policy an officer of another company testified by deposition that the assured had applied to his company for insurance, and produced the original application and the accompanying declarations of the assured and the medical report thereon. He refused to part with such originals, and certified copies were attached to the deposition. *Held*, that such copies were admissible in evidence. *Speiser v. Phœnix M. L. Ins. Co.* 530

Photographs. See NEGLIGENCE, 5, 6.

5. The question of the identification of objects photographed, as preliminary to the admissibility of the photographs in evidence, is one primarily for the trial court, and, so far as it is a question of fact, the conclusion of that court should not be overruled on appeal unless contrary to a clear preponderance of the evidence. *Hupfer v. National D. Co.* 417

Parol evidence affecting writings. See MORTGAGES, 1, 2.

6. Where a written contract is plain and definite in its terms and without ambiguity, evidence as to the contents of letters which passed between the parties prior to its making is not admissible to show the intention of the parties or add to the agreement a condition not embraced within its terms. Thus, in an action upon written contract for the sale of tomatoes to be packed by the vendor, such evidence is *held* inadmissible to show that the parties contemplated, as a condition of the agreement, that the tomatoes were to be raised on the vendor's fields or in the neighborhood of its cannery. *Newell v. New Holstein Canning Co.* 635

Degree of proof. See DEEDS, 1. REFORMATION. TRADEMARKS. WILLS, 4.

Immaterial errors in admitting or rejecting. See APPEAL, 8, 12, 13. CRIMINAL LAW, 5.

Examination, etc., of witnesses. See WITNESSES.

EXCEPTIONS. See APPEAL, 4.

EXCESSIVE DAMAGES. See DAMAGES, 4, 5.

EXECUTION. See INSURANCE, 12. JUDGMENT, 5.

EXECUTORS AND ADMINISTRATORS.

See APPEAL, 3, 20. DESCENT. LIMITATION OF ACTIONS. WILLS.

1. Sec. 3792, Stats. 1898, providing that "when a will shall have been duly proved and allowed, the county court shall issue letters testamentary thereon to the person named executor therein, if he is legally competent," etc., is mandatory; and objections going merely to the temper, disposition, habits, and moral character of the person named, rendering him obnoxious to parties interested in the estate, will not justify the court in disregarding the expressed wish of the testator. *Estate of Pike*, 45 Wis. 391, distinguished. *Saxe v. Saxe*, 557
2. If no claim based upon a note secured by mortgage is presented against the estate of the deceased maker within the time limited for such presentation under sec. 3844, Stats. 1898, personal liability on the note is extinguished, and a subsequent judgment for deficiency against the executor of the deceased maker is erroneous. *Pereles v. Leiser*, 347
3. In the trial of a cause between a claimant against an estate and the legal representative of the deceased, the fact that the latter does not defend upon all the grounds he has does not entitle the former to judgment in the absence of satisfactory proof of his claim. *McKenney v. Minahan*, 651

EXECUTORY CONTRACT. See CONTRACTS, 5–7.

EXEMPLARY DAMAGES. See DAMAGES, 2, 3. MALICIOUS PROSECUTION, 7.

EXEMPTIONS. See INSURANCE, 12. TAXATION, 1–3.

EXPRESS COMPANIES. See RAILROADS, 4.

EXPULSION of members. See CORPORATIONS, 4–8. INSURANCE, 14, 15.

EXTENSION of time for appeal, etc. See APPEAL, 21, 22.

FALSE IMPRISONMENT. See DAMAGES, 5.

FEES. See LIENS, 2.

FELLOW SERVANTS. See MASTER AND SERVANT, 6–8.

FENCES. See RAILROADS, 9–11.

FILING of papers. See LIENS, 1, 2.

FINDINGS OF FACT. See COSTS, 2.

FIRE INSURANCE. See INSURANCE, 1–5.

FLAGMAN at crossing. See STREET RAILWAYS, 1–3.

FORECLOSURE See MORTGAGES, 3.

FORFEITURES. See INSURANCE, 4, 5, 7.

FRANCHISES. See MUNICIPAL CORPORATIONS, 2–4. STREET RAILWAYS, 1–3.

FRAUD. See ATTORNEYS AT LAW. DEEDS, 1. INSURANCE, 17. JUDGMENT, 2, 3. MUNICIPAL CORPORATIONS, 14–16. PRINCIPAL AND SURETY. TRADEMARKS.

FRAUDS. STATUTE OF. See LANDLORD AND TENANT.

GARNISHMENT.

See INSURANCE, 9–12. PRINCIPAL AND SURETY.

1. Notice of issue on the answer of a garnishee need not be renewed after the service of a substituted answer setting up, in the main, the same facts. *Ellison v. Straw,* 502

2. Where the principal defendant procures the release of a garnishment by the giving of an undertaking, under sec. 2771, Stats. 1898, to pay the judgment which may be recovered, both such defendant and his sureties are estopped, in an action on the undertaking, to deny that the garnishee was indebted to him. *Wilkinson v. U. S. Fidelity & Guaranty Co.* 226

GUARDIAN AND WARD.

Void appointment: Action on bond: Limitation.

1. Where the supposed guardian of an insane person, appointed in an adversary proceeding to which the ward did not consent, gave a bond as required by the statute, conditioned, among other things, to account with the ward when she became of sound mind and pay over to her what was then found to be due, and was thereby enabled to retain possession of the ward's property and receive the income thereof against her consent, the bond, though void as a guardian's bond because the appointment was without jurisdiction, may be enforced as a voluntary obligation in respect to the condition mentioned. *Dudley v. Rice,* 97

2. In such a case the special limitation provided in sec. 3968, Stats. 1898, as to actions upon guardians' bonds, entered into and formed a part of the contract, so far as the sureties were concerned; and an action against them upon the bond is barred if not commenced within four years after the discharge of the guardian by reversal, on the ground of lack of jurisdiction, of the order appointing him. *Ibid.*

Adults incompetent to manage property: Evidence.

3. The power to appoint a guardian for an adult person depends upon the statute, and unless the requisites thereof are shown to exist the court cannot act favorably in the matter, though satisfied that the subject for whom the guardian is sought is not capable of caring for his property judiciously. *In re Streiff,* 566

4. It is not essential to the appointment of a guardian in the case above suggested, that the person be held to be either insane or an imbecile in the technical sense of those terms. *Ibid.*

5. In statutory requisites for the appointment of a guardian for an adult person, insanity is one cause and mental incompetency by reason of old age or other cause, to have the charge and management of property, another. *Ibid.*

6. Mental incompetency to have the care and management of property, within the meaning of the statute, means mental incapability in that regard. *Ibid.*

7. The mental incapability above mentioned should be substantially total. That is, it should be equivalent, substantially, to insanity or imbecility as regards ability to manage and care for

property, it being recognized, however, that such condition may exist and the sufferer be neither an idiot nor insane. *Ibid.*

8. In an application for the appointment of a guardian for a very old person, proof that such person is so mentally and physically infirm as to have no effective physical and will power to care for himself; that he is dependent daily upon the attention of others who reside with him in his own home; that such others not only do not render proper attention, but so conduct themselves as to intensify the sufferer's condition; that such sufferer is not physically or mentally able to either protect himself where situated or emancipate himself therefrom; that his condition is such as to render him susceptible to undue influence in respect to parting with his property; and that such influence has been used by the persons having opportunity in that regard, resulting in his parting with his property to them without consideration—are all material evidentiary facts bearing on the ultimate issue to be solved. *Ibid.*

GUARDIANS AD LITEM. See INFANTS.

HEARSAY. See WITNESSES, 4.

HIGHWAYS.

On town lines: Apportionment: Liability for injuries.

Under sec. 1273, Stats. 1898,—providing that where the supervisors have determined by order what part of a town line highway shall be made and kept in repair by each town and what part of the damages, if any, shall be paid by each, each such town shall have all the rights and be subject to all the liabilities in relation to its part of the highway as if the same were wholly located in such town; but if the territory of either town be increased or diminished by a change in the boundaries that part of said order fixing their liabilities shall be deemed vacated, and a new order apportioning their liabilities shall be made before the time for making the next tax roll,—such an increase of territory does not relieve one of the towns from liability for injuries sustained a few days after the change, and before the time for a new apportionment, by reason of an insufficiency in its part of the highway due to defective construction thereof by said town prior to said change of boundaries. *Wolfgram v. Schoepke,* 258

Injuries from defective sidewalks. See MUNICIPAL CORPORATIONS, 12, 13.

Vacation of streets. See MUNICIPAL CORPORATIONS, 11.

HOMESTEAD. See WILLS, 12, 13.

HUSBAND AND WIFE.

See ATTORNEYS AT LAW. COMPROMISE. INSURANCE, 12. LIENS, 3. MARRIED WOMEN, 5, 8. PRINCIPAL AND AGENT. REFORMATION. TRUSTS, 4. WILLS, 10.

Since the enactment of the Revised Statutes of 1878, a conveyance of land running to husband and wife makes them joint tenants, and the wife may convey her interest as if she were unmarried. *Wallace v. St. John,* 585

IDENTIFICATION of objects photographed. See EVIDENCE, 5.

IMPEACHMENT. See WITNESSES, 3-5.

IMPROVEMENTS: Assessments. See MUNICIPAL CORPORATIONS, 6-8.

INDICTMENT AND INFORMATION. See CRIMINAL LAW, 1, 4.

INFANTS.

Guardians ad litem: Judgment for costs: Enforcement.

1. Sec. 2931, Stats. 1898, providing that "when costs are adjudged against an infant plaintiff" his guardian *ad litem* "shall be responsible therefor, and payment may be enforced by attachment," might be sustained as to the guardian's liability, even if the provision as to enforcing payment were unconstitutional. *Burbach v. Milwaukee E. R. & L. Co.* 384
2. The "attachment" referred to in said sec. 2931 is not a *capias ad satisfaciendum*, but merely the ordinary process by which one is brought before the court to answer for an alleged contempt, and the section does not, therefore, authorize imprisonment for debt in violation of sec. 16, art. I, Const. *Ibid.*
3. Guardians *ad litem* are so distinguished from executors, trustees, or other persons prosecuting actions in a fiduciary capacity, that the legislature may properly classify them separately in respect to their liability for costs, and in so doing does not deny to them the equal protection of the laws. *Ibid.*
4. When costs are adjudged against an infant plaintiff, the liability of the guardian *ad litem* therefor results from the express provisions of sec. 2931, Stats. 1898, and need not be declared in the judgment, which should be in the ordinary form. *Ibid.*

Death or injuries through negligence. See NEGLIGENCE, 11. RAILROADS, 5-8. STREET RAILWAYS, 6, 7.

INJUNCTION. See CORPORATIONS, 4-6. JUDGMENT, 3. MUNICIPAL CORPORATIONS, 8, 14, 16. TRADEMARKS.

INSANE PERSONS. See GUARDIAN AND WARD.

INSOLVENCY. See ASSIGNMENTS. CORPORATIONS, 3.

INSTRUCTIONS TO JURY. See APPEAL, 4. CRIMINAL LAW, 2, 3. DAMAGES, 2. MALICIOUS PROSECUTION, 3, 6, 7. MASTER AND SERVANT, 11, 12. NEGLIGENCE, 10. TRIAL, 2-7.

INSURANCE.

FIRE.

Contract to procure insurance: Void policies.

1. Defendant requested plaintiff, an insurance agent, to procure fire insurance to a certain amount. Plaintiff procured and delivered two policies, in different companies, aggregating that amount, and defendant promised to pay plaintiff the premiums. Each policy (in the Wisconsin standard form) provided that it should be void in case of other insurance. *Held*, that if such policies when delivered were void as insurance contracts, each because of the other, they were binding agreements to pay to defendant the amount of the premiums on proper demand (sec. 1941—52, Stats. 1898), and hence were a sufficient consideration to support defendant's promise. *De Wolf v. Washington,* 554
2. In an action upon such promise defendant could take advantage of the invalidity of the policies as a breach of warranty, only

by pleading such breach affirmatively by way of setoff or counterclaim. *Ibid.*

Other insurance: Policies issued at same time: Estoppel.

[3. Whether, where two insurance companies issue policies upon the same property, at the same time, and through the same agent, each policy providing that it shall be void in case of other insurance, the companies, by accepting the premiums with knowledge, through said agent, of the facts, estop themselves to deny the validity of the policies, not determined.] *Ibid.*

Forfeiture: Waiver: Mortgage clause: Assignment of judgment.

4. An insurance company, claiming that a policy had been forfeited as to the owner but admitting liability, under a mortgage clause, to the mortgagee, paid to the latter the amount of a foreclosure judgment and took an assignment thereof. An action by the owner on the policy was afterwards discontinued by stipulation, the company paying to him the balance of the face of the policy in excess of the amount paid to the mortgagee, and the owner waiving and releasing all claims under the policy. It was expressly agreed that this transaction should be without prejudice to any right of the company to enforce its right to subrogation and other rights and remedies under the mortgage clause, and should not be considered as an admission of any past or present liability to the owner under the policy. *Held*, that there had been no waiver of the forfeiture which would preclude the company from enforcing the foreclosure judgment. *Wis. Nat. L. & B. Asso. v. Webster*, 476.

5. In a proceeding by the owner in the foreclosure action to have the judgment therein canceled on the ground that it had been paid by the insurance company, the question whether there had been a forfeiture of the policy not having been passed upon as one of fact by the trial court, and the facts in respect thereto not being admitted, the cause is remanded for a trial of that question before further enforcement of the foreclosure judgment. *Ibid.*

LIFE.

Agency: Waiver of forfeitures.

6. One who, though not a regular agent of an insurance company, solicited life insurance on its behalf, made application for a policy through a general agent of the company, and, when the policy was issued, delivered it to the assured, was, under sec. 1977, Stats. 1898, the agent of the company in procuring such insurance. *Speiser v. Phœnix M. L. Ins. Co.* 530

7. Knowledge by such an agent of the falsity of statements in the application of the assured which were therein warranted to be true, and delivery of the policy notwithstanding such knowledge, constituted a waiver of the forfeiture which would otherwise have resulted from such falsity, in the absence of any collusion between the agent and the assured or any one on behalf of the beneficiaries. *Ibid.*

Declarations of assured to another company: Copies. See EVIDENCE, 4.

Tontine accumulations: Garnishment: Exemptions.

8. Where a life insurance policy dated September 19, 1885, provided for payment of the accumulated surplus upon the com-

pletion of a tontine period of fifteen years, said period expired with the close of the 18th day of September, 1900. *Ellison v. Straw,* 502

9. Where the accumulated surplus upon a life insurance policy is payable to the assured, at his option, upon the completion of a tontine period, without the consent of any other person named as beneficiary, and is not payable at all in the event of the death of the assured before the completion of said period, the liability to pay such surplus, when such liability arises, is a debt owing to the assured, and the subject of garnishment as such. *Ibid.*

[10. Whether the exercise of the option of the assured, in accordance with the policy, to have such accumulation paid to him in cash, is such a condition precedent to absolute liability to him that garnishment would not lie in its absence, not determined.] *Ibid.*

11. In support of a finding of the trial court that said accumulation had become payable absolutely, it will be assumed, in the absence of any exception to such finding and of any bill of exceptions containing the evidence, that the assured took all steps legally necessary to make the liability absolute. *Ibid.*

12. Although the wife of the assured is named as the beneficiary in a life insurance policy, the accumulated surplus thereon, which is payable absolutely to the assured at the expiration of a tontine period if he survives that period and the policy is then in force, is not exempt from the claims of his creditors under sec. 2347, Stats. 1898. *Ibid.*

BENEFIT ASSOCIATIONS.

Change of beneficiary, when completed.

13. Nothing in the constitution, by-laws, rules, or regulations of a mutual benefit society in any manner provided for or restricted the right of a member to change the beneficiary named in his certificate; but it was customary to make such a change at the request of the member upon his surrendering the old certificate and paying a small fee. A member, knowing such custom, wrote to the grand secretary of the society, asking him to change the beneficiary named in his certificate, and was by said officer informed that he must give the certificate and fee to the local secretary, who would forward them to the grand secretary, and the new certificate would be issued. This direction was fully complied with by the member ten days before his death, but the local secretary failed to forward the certificate or fee to the grand secretary, and the new certificate was never issued. *Held* that, as the insured had done all that he was required to do, and only formal, ministerial acts remained to be performed by officers of the society, the change of beneficiary must be deemed complete. *Waldum v. Homstad,* 312

Forfeiture: Roman Catholic society: Excommunication.

14. By the articles of incorporation and the constitution of a benefit society organized for the sole benefit of members of the Roman Catholic Church, none but practical Catholics could be admitted, and members must remain practical Catholics and communicants of the church in order to participate in the benefits. In an application for membership (which became part of the insurance contract) the applicant agreed that upon any failure

to conform strictly to the constitution he should forfeit all right to membership and benefits, and the certificate issued to him further provided that the death benefit should only be payable in case he should so conform. Afterwards the member was married by a Protestant minister and *ipso facto* was excommunicated and ceased to be a Catholic. *Held*, that all liability on the benefit certificate thereby ceased, the provisions of the contract being self-executing. *Barry v. Catholic Knights*, 362

15. Membership in the society being purely voluntary, the provisions above mentioned, in its laws and contracts, were not contrary to public policy, and did not interfere with any rights of conscience or impose any religious test, within the meaning of secs. 18, 19, art. I, Const. *Ibid.*

Who are "survivors" of member: Fraud.

16. The code of a mutual benefit society stated that the purpose of its mortuary fund was that a certain sum be paid therefrom to the "survivors" of a member after his death, and provided that if the "survivors" of a deceased member should not possess a death benefit certificate the money should be paid only to one who should produce an order from the proper court, and that if the "survivors" should produce a certificate they should, on receiving the money, sign the receipt printed on the back of such certificate. *Held*, that the word "survivors" did not include one who was neither a relative of the deceased member, nor a member of his household, nor connected with him by marriage. *Koerts v. Grand Lodge*, 520

17. Where the issuance of a death benefit certificate was procured by false representations by the member that the beneficiary named was one of the class for whose benefit the mortuary fund was established, and the fraud was not discovered until after the member's death, such beneficiary, whose right rests upon the certificate alone, cannot recover thereon. *Ibid.*

INTOXICATING LIQUORS. See DEEDS, 2.

JOINDER.
Of causes of action. See PLEADING, 1.
Of parties. See LOGS AND TIMBER. PLEADING, 5.

JOINT TENANTS. See HUSBAND AND WIFE.

JUDGMENT.

On claim: Proof required. See EXECUTORS, 3.

Notwithstanding the verdict. See APPEAL, 15.

For deficiency, on foreclosure. See APPEAL, 3. EXECUTORS, 2. MORTGAGES, 3.

Against infant: Costs: Guardian ad litem. See INFANTS, 4.

Vacating. See APPEAL, 1. INSURANCE, 4, 5.

1. The circuit court has power, with or without a motion, to vacate, at any time during the same term, any order or judgment entered through mistake, inadvertence, or want of proper deliberation, even though such order or judgment is the result of a series of erroneous rulings; as, for instance, where the judgment to be vacated was entered pursuant to an order granting a nonsuit and a subsequent order denying a motion

to vacate such nonsuit and for a new trial. *Smith v. Milwaukee E. R. & L. Co.* 336

Equitable relief against. See JUSTICES' COURTS, 2. MUNICIPAL CORPORATIONS, 14–16.

2. A court of equity has jurisdiction to grant relief from a judgment obtained by fraud perpetrated by the judgment creditor, the judgment debtor not being guilty of any inexcusable ignorance or negligence. *Balch v. Beach,* 77

3. Equity jurisdiction is not competent to afford relief in the situation last mentioned by granting a new trial or disturbing the judgment, but is by acting upon the judgment creditor, preventing him from enforcing his judgment. *Ibid.*

Conclusiveness.

4. The withdrawal of a claim presented in assignment proceedings, and entry of an order or judgment to the effect that the claim was withdrawn and all proceedings thereon dismissed,—the merits of the claim not being passed upon,—is in the nature of a voluntary nonsuit, and the matter of such claim does not thereby become *res judicata* against the claimant. *Fischbeck v. Mielenz,* 27

Assignment: Enforcement by assignee. See INSURANCE, 4, 5.

5. Upon an execution sale the judgment creditor, a bank, bid in personal property for less than the amount of the judgments, and agreed with the debtor that, after satisfying the indebtedness from the proceeds of such property, it would return any surplus to him. Afterwards, having realized from the property a sum nearly equal to its demand, the bank turned the remainder of the property over to one M., and assigned the judgments to him, upon his paying a certain sum. M. was acting for the judgment debtor. In a controversy between M. and one upon whose land the judgments were liens, it is *held* that M. merely succeeded to the rights of the bank and was accountable accordingly, and that the judgments were enforceable in his hands only for the balance due thereon over and above what had been realized by the bank from the personal property. *Fischbeck v. Mielenz,* 27

Payment and satisfaction. See EVIDENCE, 2. JUDGMENT, 5.

Undertaking to pay, in garnishment: Fraud. See PRINCIPAL AND SURETY.

JURISDICTION. See APPEAL, 5. CORPORATIONS, 4, 7. GUARDIAN AND WARD, 1–3. JUSTICES' COURTS, 1.

JUSTICES' COURTS.

Jurisdiction. See APPEAL, 5. OFFICERS, 2.

1. A justice lost jurisdiction by an unauthorized adjournment. On the adjourned day defendant, who had been subpœnaed as a witness, failed to appear, and was arrested and brought into court by attachment. After showing these facts, the justice's docket states that defendant "now appears and asks that this cause be continued until," etc.; that the motion was granted; and that "by consent of the parties" the action was adjourned accordingly. *Held,* that defendant's appearance was voluntary, and the justice thereby regained jurisdiction. *Holz v. Rediske,* 563

Minutes as evidence. See MALICIOUS PROSECUTION, 2.

Vacating judgment. See APPEAL, 1.

2. A circuit or superior court has no power to vacate a justice's judgment upon mere motion. *Deuster v. Zillmer,* 402

JUSTICES OF THE PEACE: Election: *De facto* officers. See OFFICERS, 2.

LACHES. See APPEAL, 19. WILLS, 8.

LAKES. See WATERS, 1, 2.

LANDLORD AND TENANT.

See MARRIED WOMEN, 8.

1. In case of a lease of real estate for more than one year, executed by an agent of the owner without being duly authorized thereto in writing pursuant to sec. 2302, Stats. 1898, the lessee taking possession of the premises, he thereby becomes the equitable owner of the estate, in form created thereby, subject to the terms of the lease, and is legally liable for the rent reserved, at least so long as he enjoys the property. *Kriz v. Peege,* 105
2. Where a lease is signed in the manner indicated in the last foregoing paragraph, the person purporting to have authority as agent not having such in fact, if the lessee takes possession and pays rent, the owner receiving the same with knowledge of the facts, he thereby gives original validity to the transaction as creating a property right to a lease good at law in conformity to the terms of the agreement. *Ibid.*

LEASES. See CONTRACTS, 5. LANDLORD AND TENANT. MARRIED WOMEN, 8. TAXATION, 3.

LEGAL CAPACITY to sue: Demurrer. See PLEADING, 4.

LICENSEES. See NEGLIGENCE, 1.

LICENSES: Transient dealers. See MUNICIPAL CORPORATIONS, 9, 10.

LIENS.

Of mechanics, etc.

1. A claim for a mechanic's lien is "filed," in legal contemplation, when presented to the clerk to be filed, and retained by him as such clerk. *Lang v. Menasha Paper Co.* 1
2. Although the clerk may, under sec. 748, Stats. 1898, require his fees for filing such claim to be paid in advance, if such payment is not made nor requested when the claim is presented for filing it is his duty, nevertheless, to place his file mark upon the claim and docket it; and his failure to perform that duty will not prevent the filing from being effectual. *Ibid.*
3. Testimony of defendant that she knew, soon after the excavation was begun, that a house was being built by her husband on a lot owned by her, and that shortly thereafter she executed a mortgage thereon and turned the money over to her husband to use in building the house, sufficiently proves her knowledge and consent, so that, under sec. 3314, Stats. 1898, a lien for materials furnished and used in the building might attach to the land. *Lentz v. Eimermann,* 492
4. Under sec. 3317, Stats. 1898, the lien of a subcontractor was not waived or discharged by his taking an order for the amount

due him, drawn by the principal contractor upon the person building the house, even though the latter accepted the order conditionally and made partial payments thereon, where such order was not expressly received as payment. *Ibid.*

5. Under sec. 3320, Stats. 1898, the court may permit the claim for a lien to be amended at the trial so as to show with whom the original contract was made. *Ibid.*

6. "Notice in writing" of a subcontractor's claim for a lien may properly be given to the owner, under sec. 3315, Stats. 1898, by service upon him of a *copy* of the notice. *Ibid.*

On assigned property. See ASSIGNMENTS, 7-9.

Of judgment. See JUDGMENT, 5.

LIFE INSURANCE. See INSURANCE, 8-17.

LIGHTING CONTRACT. See MUNICIPAL CORPORATIONS, 2-4.

LIMITATION OF ACTIONS.

See ADVERSE POSSESSION. EXECUTORS, 2. GUARDIAN AND WARD, 2. LOGS AND TIMBER, 2. TAX TITLES, 2.

Under sec. 4222, Stats. 1898 (providing that no action for an injury to the person shall be maintained unless, within a year thereafter, "notice in writing, signed by the party damaged, his agent or attorney, shall be served," etc.), a notice signed by an attorney "for claimant," stating that plaintiff's intestate was instantly killed by the accident described, and that satisfaction is claimed by the plaintiff, administrator of the estate, is *held* sufficient, it not being necessary that the notice be given by the beneficiaries, the widow and children, or that it specifically notify the defendant of a claim for their damages. *Hupfer v. National D. Co.* 417

LOGS AND TIMBER.

1. A complaint alleged that defendants wrongfully cut and removed logs from certain lands in which plaintiff's assignor owned an undivided interest, wrongfully manufactured the same into lumber, intermixed it with other lumber, sold and delivered the whole to persons unknown, and converted the proceeds to their own use; and that plaintiff's assignor suffered damage "by reason of said several acts of conversion." It also alleged that plaintiff's assignor owned an undivided interest in the lumber after its manufacture from the logs. It appeared that the original cutting and removal was done by certain of the defendants, that the logs were made into lumber by their vendee, and that the subsequent sales and delivery of the lumber were the acts of other defendants. *Held*, that the cause of action stated was for the original cutting and taking of the logs, the defendants not participating in such trespass being joined pursuant to sec. 4269, Stats. 1898, as being purchasers with notice. *Grunert v. Brown*, 126

2. The action in such case was barred if not commenced within six years after the date of the original trespass; and a dismissal as to all defendants except those who had been guilty of a subsequent conversion of the lumber could not alter the

nature of the action or change the date from which the limitation began to run. *Ibid.*

LOST WILLS. See WILLS, 3-6.

MALICE. See DAMAGES, 3, 4.

MALICIOUS PROSECUTION.

See DAMAGES, 3, 4.

1. In an action for malicious prosecution of plaintiff on charges of obtaining money under false pretenses and of embezzlement, plaintiff claimed that the prosecutions were instituted for the sole purpose of collecting the money due under a contract for the sale of land to him by defendant, and hence were malicious. *Held*, that evidence that after the prosecutions a man placed upon the land by defendant forbade plaintiff to go thereon, was admissible as throwing light upon defendant's motives in the prosecution. *Eggett v. Allen*, 625
2. In an action for malicious prosecution the reception in evidence of the justice's minutes of testimony taken on such prosecution was error, but not prejudicial where substantially all the facts contained in such minutes were either admitted or testified to without contradiction in the action. *Ibid.*
3. Instructions that "probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest or strong suspicion that the person arrested is guilty," and that "mere belief of guilt, however strong, sincere, and honest, will not constitute probable cause, unless founded on circumstances sufficient to warrant it," are approved. *Ibid.*
4. Whether a prosecution is malicious or not is a mixed question of fact and law. If the jury find that the prosecution was begun for a vindictive, ulterior, or unlawful purpose, the law then says that there was legal malice, and if the jury also find lack of probable cause the cause of action is complete. *Ibid.*
5. The discharge of defendant in a criminal prosecution because of a lack of evidence to convict is *prima facie* evidence of want of probable cause for the prosecution, even though the magistrate did not certify to that effect in his docket, nor render judgment against the complainant for costs, as permitted by sec. 4791, Stats. 1898, in such cases. *Ibid.*
6. The court instructed the jury that though the signature to the criminal complaint might not be defendant's, yet if he counseled with his attorney and authorized the prosecution and took part in maintaining it he is liable; but that they might consider the question whether he signed the complaint, and whether he supposed the proceedings were tort or criminal in their nature, as bearing on the question of malice. *Held*, that any inaccuracy in limiting the effect of defendant's supposition as to the nature of the proceeding to its bearing on the question of malice, whereas it might also have a hearing on the question of probable cause, was cured by a subsequent instruction that the jury might consider what transpired between the defendant and his attorney, in deciding whether he acted maliciously and without probable cause. *Ibid.*
7. Where the jury were charged, in effect, that there could be no recovery if the criminal prosecution was the unauthorized act

of an agent of defendant, it was not error, in a subsequent instruction as to punitory damages, to omit to state that, if the prosecution was such unauthorized act, ratification thereof by defendant must be shown in order to charge him with punitory damages. *Ibid.*

MARRIAGE. See WITNESSES, 4.

MARRIED WOMEN.

See HUSBAND AND WIFE.

1. Secs. 2342, 2343, Stats. 1898, removing the common-law disabilities of married women to some extent, are entitled to a liberal construction, carrying out broadly the manifest legislative purpose in enacting the same. *Kriz v. Peege,* 105
2. Under such statutes a married woman has the same right to acquire property of any kind and in any way, and dispose of, use, or otherwise enjoy the same, that an unmarried female has. *Ibid.*
3. The capacity of a married woman to bind herself to pay an indebtedness incurred for property acquired by her is not dependent upon the purpose to which she intends to devote the property or whether she has a separate property or business. She may pledge her credit for anything of value acquired by her in the transaction as freely as an unmarried woman. *Ibid.*
4. Where a married woman pledges her credit for property, whether such property be in the form of money or any other thing of value, the only essential to the validity of her contract at law is that the equivalent for the credit extended shall actually pass to and vest in her, devoid of any obligation incurred in the transaction preventing her from enjoying such equivalent as her separate property. *Ibid.*
5. A married woman may, at the time of acquiring property and pledging her credit therefor, purpose devoting the same to the benefit of her husband, and the creditor know of that fact and be induced thereby to extend credit to her, and such circumstances, in the absence of any obligation incurred by her in the transaction to so devote it, will not militate against the legal validity of her obligation to pay as promised. *Ibid.*
6. The making of a contract by a married woman concerning her separate property or business under the statutes is one thing. The precedent ownership of property or business or contemplation of a business enterprise is not essential to its validity. The making of a binding contract otherwise is a different matter. The disability of the common law as to the latter has not been removed, therefore it is essential to the making of such a contract that the woman have at the time thereof a separate property and intend in the transaction to charge the same. *Ibid.*
7. Cases dealing with contracts of married women, authorized impliedly by the statutes, and those dealing with contracts of such women still governed by the common law, should be carefully distinguished, one class from the other, to the end that those where the rules governing the latter have erroneously been cited as governing the former, may not mislead. *Ibid.*

8. By a lease of realty made to a married woman and her husband, though she may intend in the transaction to thereby aid him in obtaining a place in which to do business, she acquires as her separate property an undivided one-half interest in the estate, thereby created, as completely as if she were a *feme sole*, and becomes liable at law for payment of the rent reserved. *Citizens L. & T. Co. v. Witte*, 116 Wis. 60, 92 N. W. 443. *Ibid.*

MASTER AND SERVANT.

Contract for services: Termination, etc. See CONTRACTS, 5–7.

1. A contract by which plaintiff agreed to act as traveling salesman for defendant from April 1, 1900, to December 31, 1900, at a salary of $1,000 per year and expenses, and providing that a failure by either party to faithfully carry out his part of the agreement should be sufficient cause for termination of the contract by giving thirty days' notice, is *held* to have been an entire contract, although prior to his discharge plaintiff had been paid in monthly *pro rata* instalments. *Ornstein v. Yahr & Lange Drug Co.* 429

2. Under a contract for the employment of a traveling salesman, providing that he should be paid his expenses, "not to exceed an average of $7 per working day," all Sundays actually spent in the service should be included as working days, in calculating such average. *Ibid.*

3. After the wrongful discharge of one employed under an entire contract, he may elect to treat the contract as rescinded and recover on a *quantum meruit* for services actually rendered, or may sue, either before or after the expiration of the agreed term of service, for damages actually resulting from the breach; but an election of either remedy will be a waiver of the other, and one recovery of damages for the breach, though it be only of the *pro rata* amount for one month's service, will be a bar to any subsequent recovery. *Ibid.*

4. Plaintiff claimed that he had been employed by defendant at a certain monthly salary in addition to the payment of his expenses and a commission on sales made by him. From time to time during his term of service he rendered statements of account in accordance with such claim, and defendant's officers made no objection thereto, but, with full knowledge thus brought home to them of plaintiff's understanding of the contract, gave no intimation that they understood it otherwise, for about eighteen months, while they encouraged plaintiff to continue his services. *Held*, that defendant was estopped to deny that the contract was as claimed by plaintiff. *Moller v. J. L. Gates Land Co.* 548

Injuries to servants: Negligence.

5. Plaintiff, while working as head sawyer in a sawmill, was struck and injured by a strip of lumber which, while passing between the saws of an edger, was caught by a saw and thrown back. Upon the evidence—tending to show that his duties did not require him to, and he never did, have anything to do with the operation of the edger or with the men running it; that when at his work, and at the time of the injury, he was fifty-seven feet away from the edger, with his back to it; that in

passing to and from his work he went within twenty-five feet of the edger, but did not examine it, and did not know there were any appliances to keep boards from coming back; and that he never saw or knew of boards coming back from it before he was hurt—it is *held* that a verdict for defendant should not have been directed on the ground that plaintiff was guilty of contributory negligence or had assumed the risk. *Grant v. Keystone L. Co.* 229

6. The plaintiff in such case, whose duties as head sawyer consisted in operating a circular saw for sawing logs into lumber, and the men operating the machine for edging the lumber, were fellow-servants, being employed by the same master, under the same control, and performing services for the same general purpose. *Ibid.*

7. Upon the evidence—tending to show that the edger was defective and out of repair in particulars affecting the likelihood of lumber being caught and thrown back—it is *held* that the questions whether or not plaintiff's injury was caused wholly by the negligence of his fellow-servants operating the edger, and whether or not the negligence of defendant (the mill owner) in respect to the machine was the proximate cause of the injury, were questions for the jury. *Ibid.*

8. An employer who has negligently permitted the use of a machine in doing his work, which, by reason of its defects, is unnecessarily dangerous to his employees, is liable for an injury resulting from its use to an employee who was not himself negligent, even though a co-employee was guilty of negligence in managing the machine, and if it had been carefully handled the accident would not have occurred. *Ibid.*

Torts of servant: Liability of employer.

9. Where it was the duty of a floorwalker in a department store to watch customers and to take stolen merchandise away from those whom he discovered in the act of stealing, and in endeavoring to perform this duty, acting upon the honest belief that a customer had stolen property in the store, he locked her in a room and searched her, his employer is liable for such acts, because they are within the scope of the employment. *Cobb v. Simon,* 597

10. But if the floorwalker knew that the customer had not stolen anything, and falsely or by a trick made it to appear that she had, and imprisoned and assaulted her in order to extort money from her, the employer is not liable for any of such acts, because in doing them the floorwalker stepped aside from his employment and committed a tort for his own purposes. *Ibid.*

11. An instruction to the jury, in such a case, that "a master is liable for a wrong done by his servant, whether through negligence or malice of the latter, in the course of an employment in which the servant is engaged to perform a duty which the master owes to the person injured," is *held* so inapplicable to the relations between a merchant and the customers in his store that the giving thereof was error. *Ibid.*

12. The question being whether defendant had ratified the acts of his floorwalker in imprisoning plaintiff and searching her for stolen goods, and the only fact in evidence from which such ratification could have been rightfully found being the reten-

tion of such floorwalker in his employment after defendant had been informed of plaintiff's story, an instruction that ratification may be signified by acts of omission as well as of commission, is *held*, while correct as a general proposition, to have been misleading and prejudicial, since under it the jury might well have found ratification from acts or omissions entirely inadequate for that purpose, such as the mere omission of defendant to go to see the plaintiff after being informed of her story. *Ibid.*

13. Retention of a servant in his employment after notice to the employer of a tortious act of the servant is evidence of ratification of the act; but to justify the conclusion of ratification the information to the employer should be full and complete. *Ibid.*

14. It is not essential in such a case that the information should come from the injured person, but however it comes it should be so convincing and persuasive as to convince the mind of an ordinarily prudent employer that the facts exist which call for the servant's discharge. *Ibid.*

15. The question of ratification in such a case is generally one for the jury, in view of all the information which came to the employer. *Ibid.*

MAXIMS.
Expressio unius est exclusio alterius, 270.
Judicia sunt tanquam juris dicta et pro veritate accipiuntur, 88.
Omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium, 652, 657.
Stare decisis, 208, 632.

MEASURE OF DAMAGES. See CHATTEL MORTGAGES, 5. CONTRACTS, 7. MASTER AND SERVANT, 3.

MECHANICS' LIENS. See LIENS.

MENTAL CAPACITY. See GUARDIAN AND WARD, 3-8. WILLS, 1, 2.

MERITS, Showing of. See ACTION, 2.

MINORS. See INFANTS.

MISTAKE. See REFORMATION. TAXATION, 6. WILLS, 11.

MORTGAGES.

Given as payment of judgment. See EVIDENCE, 2.

Given as collateral security: Parol evidence.

1. Parol evidence is admissible to contradict the absolute terms of a note and mortgage by showing that they were not given for a debt then existing, but merely as collateral security, and to describe or define the undertaking or liability to which they are collateral. *Lippincott v. Lawrie,* 573

2. Thus, in this case, parol evidence was admissible to show that a note and mortgage for $3,000 were given as security for any balance which might thereafter be due from the mortgagor, not only for goods purchased up to said amount, but also as continuing security for goods purchased beyond that amount—the liability on the instruments themselves, however, not to exceed $3,000. *Ibid.*

Taken by husband in wife's name. See TRUSTS, 4.

Mistake: Reformation. See REFORMATION.

On devisee's interest in homestead. See WILLS, 13.

Mortgage clause in policy: Subrogation. See INSURANCE, 4, 5.

Foreclosure: Judgment for deficiency. See APPEAL, 3. EXECUTORS, 2.

Same: Completion of judgment: Time for sale.

3. After the reversal of that part of a foreclosure judgment which adjudged that certain defendants were not personally liable for any deficiency, the judgment was completed in the trial court pursuant to the mandate of the appellate court, and contained an order for judgment against said defendants for any deficiency on the sale, they being adjudged personally liable therefor. *Held* that, under sec. 3162, Stats. 1898, as against those defendants there could be no sale until the expiration of a year after such completion of the judgment. *Citizens L. & T. Co. v. Witte,* 517

MUNICIPAL CORPORATIONS

Powers: Unreasonable exercise: Lighting contract: Validity.

1. Though broad scope and great deference will be accorded to the discretion of municipal corporations in the exercise of the legislative powers granted to them, yet such powers, being delegated solely for public purposes, must be exercised with reference to such purposes, and acts which in that aspect are wholly unreasonable will be held invalid. *Le Feber v. West Allis,* 608
2. A village ordinance conferring franchises upon and making a contract with a corporation bound the village and its municipal successors for a term of thirty years (and practically for fifty years) to take all its lights from the corporation and pay for them during the whole period at rates definitely fixed therein, which considerably exceeded prices paid elsewhere under similar circumstances, and containing other provisions significant of a purpose merely to benefit the corporation, without consideration for the public welfare, is *held* invalid. *Ibid.*
3. The fact that the ordinance had been submitted to and approved by a vote of the electors of the village, so that it was the duty of the village board, under sec. 959—52, Stats. 1898, to grant the franchise, does not prevent the ordinance from being held void for unreasonableness. *Ibid.*
4. The unreasonable features of such ordinance and the other portions thereof are so interdependent that the whole must be held void. *Ibid.*

Officers: Civil service rules. See OFFICERS, 1.

Policemen's pension fund. See POLICEMEN'S PENSION FUND.

Contracts ultra vires: Remedies.

5. If one deals with a municipal corporation in respect to a matter beyond its corporate power and prohibited, he can have no relief, either at law or in equity, to save himself from loss; though in the absence of the element of prohibition he may obtain relief if not guilty of more than constructive wrong, so far as his money or property shall have been used by the municipality for its legitimate corporate purposes. *Balch v. Beach,* 77

Limitation on indebtedness. See CONSTITUTIONAL LAW.

School taxes: Levy. See TAXATION, 8.

Public library, devise for. See PERPETUITIES, 5, 6.

Improvements: Docks: Special assessments.

6. Provisions of a city charter authorizing the common council to order riparian owners to build docks along a navigable river or harbor and, if they fail to do so within the time specified, to award contracts for the work and charge the cost as a special assessment upon the property upon or in front of which the docks are built, regardless of the question of special benefits accruing thereto, are invalid as authorizing the taking of private property for public use without compensation. *Lathrop v. Racine,* 461

7. Such charter provisions are not justified as an exercise of police power. *Ibid.*

8. The building of such docks by the city and assessment of the cost upon the abutting property pursuant to such charter provisions being wholly without authority of law, a riparian owner who had refused, when ordered, to build the dock upon his land and had never consented to pay the cost thereof, may have the enforcement of such assessment upon his land restrained. The mere facts that he had conveyed a small portion of his land to the United States for harbor purposes, that he knew the work was in progress, and that the suit was not commenced until after the work was completed, do not estop him to question the validity of the assessment. *Ibid.*

Licenses to transient dealers.

9. A municipal ordinance providing that "no transient merchant, trader, or dealer who shall bring into the city" any goods "for the purpose of selling the same from house to house, . . . shall be permitted to sell or expose for sale, barter or exchange by sample or otherwise at retail, or to customers, any such goods," etc., without first having obtained a license therefor, is not applicable to a traveling agent for a mercantile establishment located in another city who carries with him no goods for sale but merely solicits orders by sample, to be filled, if accepted, out of the stock of his principal in the other city and sent to the purchaser by the ordinary methods of transportation. *Wausau v. Heideman,* 244

10. A "transient merchant, trader, or dealer," within the meaning of such an ordinance, is one who goes about taking with him the goods which he offers for sale or in which he deals or trades,—not one who, as agent, merely solicits orders for goods for his principal, whether by sample or otherwise. *Ibid.*

Streets: Vacation for railway purposes: Estoppel.

11. By an agreement between railway companies and a city the former were to contribute to the improvement of a certain street and the city was to vacate parts of certain other streets to accommodate the railway yards and depots. The city passed an ordinance in form vacating said parts of streets, and the companies fulfilled the agreement on their part. The ordinance was void because statutory requirements were not complied with, and six or seven months after its passage it was repealed. In the absence of proof that defendant (one of said railway companies) had erected any structures or incurred

any considerable expense in reliance upon the attempted vacation, it is *held* that the city is not estopped to claim that the streets had not been vacated. *Ashland v. C. & N. W. R. Co.* 105 Wis. 398, followed. MARSHALL, J., and CASSODAY, C. J., dissent, being of the opinion that in view of all the circumstances (including the undisturbed occupancy of the streets by the railway companies for more than ten years, positive acts of encouragement on the part of the city to continue such occupancy, the expenditure of large sums by the railway companies in improvements, and the final creation of a situation from which they cannot recede without great loss) the city should be held estopped. *Ashland v. N. P. R. Co.* 204

Defective sidewalks: Injuries: Contributory negligence.

12. Though a traveler on a sidewalk may have the right to assume that the walk is reasonably safe, it is his duty, nevertheless, to exercise ordinary care as he proceeds and to observe defects which are plainly visible. The fact that he is injured by such a defect is sufficient to rebut the presumption in his favor of due care, and to put upon him the burden of showing some excuse for not seeing the danger, such as a reasonable diversion of his attention at the instant of the injury. *Bohn v. Racine,* 341

13. In an action for injuries alleged to have been caused by a defective sidewalk, the evidence tended to show that, although the accident happened in the evening, the defect in question (caused by the laying of a new cement walk) was plainly visible at the time, and that plaintiff knew the new walk was being laid, having frequently and recently passed in plain view of the whole situation; and there was no evidence that his attention was diverted in any way at the time of the accident. *Held,* that the decision of the trial court refusing to set aside a verdict finding contributory negligence should not be disturbed. *Ibid.*

Collusive judgment on invalid claims: Remedies of taxpayers.

14. If public officers, by fraudulent collusion, neglect to perform their duties in respect to preventing the incorporation of invalid claims against their municipality in a judgment, taxpayers thereof, acting seasonably, may intervene by a suit in equity in the name of one or more of them acting for all, and successfully invoke its jurisdiction to restrain the collection of the judgment. *Balch v. Beach,* 77

15. In the situation last stated the suing taxpayers act in a twofold capacity: as vindicators of their own right, and of that of the corporation. The existence of the latter being essential to that of the former, the suit is in form to enforce the right of the corporation. Whether the right and remedy of the corporation be legal or equitable, the right of the taxpayer is legal and his remedy equitable. *Ibid.*

16. The power of equity to protect the taxpaying public from loss by the misuse of public funds in the payment of invalid claims is not exhausted upon such claims being robed in a judgment, that being obtained by fraudulent collusion, actual or constructive. *Ibid.*

MUTUAL BENEFIT ASSOCIATIONS. See INSURANCE, 13–17.

NAVIGABLE WATERS. See MUNICIPAL CORPORATIONS, 6–8. WATERS, 1, 2, 5.

NEGLIGENCE.

Injury to licensee: Defective elevator: Liability.

1. Where plaintiff went upon defendants' premises to transact his own private business with defendants' employees, in which defendants themselves had no interest, he was a mere licensee, even though one of the defendants had directed or permitted him to use a certain elevator; and, if there was no active negligence on defendants' part, he cannot recover for injuries sustained while using such elevator. *Muench v. Heinemann*, 441

Nonsuit: Proof of facts peculiarly in defendant's knowledge.

2. In an action based upon alleged negligence of the defendant, if any reasonable probability of negligence may account for the event by inference from the evidence within plaintiff's control, defendant should be put to his proofs to supply the facts as to his own conduct, and plaintiff should not be nonsuited merely because he has not fully established those acts of which he can acquire knowledge only from the defendant or those in his interest. *Hupfer v. National D. Co.* 417

Bursting of distillery vat: Evidence.

3. In an action for the death of plaintiff's intestate caused by the bursting of a vat containing distillery slops, it is *held* that plaintiff's evidence tended to establish that the collapse of the vat was due to a weakening of the iron hoops from natural causes which the defendant should have anticipated and guarded against, and might have supported an inference of defendant's lack of ordinary care; and that it was error, therefore, to grant a nonsuit. *Ibid.*

4. Declarations of an employee of the defendant whose duty it was to sell slops from the vat and to control the manner of delivery, to the general effect that he had knowledge of the defective condition of the vat and hoops, made within five or ten minutes after the bursting of the vat and while he was rescuing and caring for plaintiff's intestate, who had been washed from the platform on which the vat stood and carried some distance down a hill by the flood of scalding slops, are *held* to have been a part of the *res gestæ*, and admissible as such, whether they could be regarded in the light of admissions or not; and error in excluding them was presumably prejudicial. *Ibid.*

5. It having been shown that a certain officer or employee of the defendant corporation had full authority as to the disposition of the hoops after the bursting of the vat, and that he had directed that they be removed to a certain place, his subsequent identication of the hoops there, at the request and in the presence of one of plaintiff's attorneys and a photographer, was within the scope of his authority, and evidence thereof was admissible against the defendant. *Ibid.*

6. The evidence on a second trial to prove that hoops shown in certain photographs were the hoops which came from the bursted vat is *held* so different from that on the former trial (discussed in 114 Wis. 279), that the decision upon the former appeal was not necessarily controlling upon the question of the admissibility of the photographs. *Ibid.*

Injury to passenger. See STREET RAILWAYS, 4.

Injury to yardmaster switching cars: Proof of custom: Contributory negligence: Proximate cause.

7. Plaintiff, a railroad yardmaster, while switching cars in the nighttime, was riding upon the ladder on the side of a freight car and was knocked therefrom by a car upon an adjoining switch track, which, after being placed upon such track, had been moved by the defendant lumber company to a point nearer where the two tracks came together. The evidence being conflicting as to the width of the cars and whether the two tracks were at any place far enough apart so that a person riding as plaintiff was could pass the other car without injury, it is *held* that the lumber company was not entitled to the direction of a verdict on the ground that it did not, by moving the car, increase the danger. *Boyce v. Wilbur Lumber Co.* 642

8. As a general rule, evidence to show the usual or ordinary methods of others in the same business is admissible upon the question of negligence; but this rule is subject to exceptions, among which are that such evidence cannot be allowed to contradict common knowledge, nor is it admissible to prove a custom which is so obviously dangerous to life and limb as to be at once recognized as such by all intelligent persons. *Colf v. C., St. P., M. & O. R. Co.* 87 Wis. 273, so far as it conflicts herewith, overruled. *Ibid.*

9. The act of a brakeman or yardmaster in riding upon the ladder on the side of a freight car in the course of switching operations is not so obviously dangerous as to preclude proof that it is customary. *Ibid.*

10. Upon the question whether plaintiff was guilty of negligence which contributed proximately to the injury, it was error to charge the jury that "proximately" in that connection means materially or efficiently. *Ibid.*

Injuries to employees. See MASTER AND SERVANT, 5–8.

Injury to express messenger: Contract exempting from liability. See RAILROADS, 3, 4.

Injury to traveler on street. See STREET RAILWAYS, 5.

Killing child at street crossing. See RAILROADS, 5–8. STREET RAILWAYS, 6, 7.

Same: Contributory negligence.

11. A child twenty-five months old is not chargeable with contributory negligence. *O'Brien v. Wis. Cent. R. Co.*

Killing animals on track: Fences. See RAILROADS, 9–11.

Defective highways and sidewalks. See HIGHWAYS. MUNICIPAL CORPORATIONS, 12, 13.

Negligent delay in delivering telegram. See TELEGRAPH COMPANIES.

Admissions as to cause of accident. See EVIDENCE, 3.

NEW TRIAL. See APPEAL, 14–17. JUDGMENT, 3.

NONSUIT. See JUDGMENT, 1, 4. NEGLIGENCE, 2, 3.

NOTICE.
Of issue. See GARNISHMENT, 1.
Of claim for lien. See LIENS, 6.
Of claim for injury. See LIMITATION OF ACTIONS.
Of fraud. See PRINCIPAL AND SURETY.

NUISANCE. See WATERS, 1, 2.

OFFICERS.

Appointment: Civil service rules: Deputies of bonded officer.

1. The official bond of a city clerk, general in its terms, covering, as required by law, all the administrative duties of his office, includes all acts of his deputies and assistants within the scope of their authority; and such assistants are therefore within the exemption clause of a city service act (sec. 6, ch. 313, Laws of 1895) which provides that officers and clerks, for the faithful discharge of whose duties a superior officer is required to give bond, shall not be affected by the rules of the city service commissioners as to their election, selection, or appointment. *Butler v. Milwaukee,* 526

Election: Holding over: De facto officers: Justices of the peace.

2. M. and H. were duly elected and qualified as justices of the peace, for the term of two years and until their successors should be elected and qualify. They were the only justices in the town, although it was entitled to four. At the next election H. was re-elected and three new justices were elected, none of them being designated on the ballots as the successor of M. One of the three new justices, whose residence was nearest to M., failed to qualify; and M., claiming for that reason to be entitled to hold over under his previous election, continued to act as a justice. *Held,* that he was a justice *de facto,* whose right to the office could not be questioned in a mere collateral proceeding. *Deuster v. Zillmer,* 402

Clerks of courts: Filing papers. See LIENS, 1, 2.

Clerks of cities, towns, etc. See TAXATION, 4.

City treasurer. See TAXATION, 8.

Municipal officers: Fraud: Collusive judgment. See MUNICIPAL CORPORATIONS, 14–16.

School district officers. See MUNICIPAL CORPORATIONS, 14–16.

Officers of corporations. See CORPORATIONS, 2–8.

OFFICIAL BONDS. See ASSIGNMENTS, 1. OFFICERS, 1.

ORDINANCES. See MUNICIPAL CORPORATIONS, 1–4, 9–11.

PARENT AND CHILD. See RAILROADS, 8.

PAROL EVIDENCE affecting writings. See EVIDENCE, 6. MORTGAGES, 1, 2.

PARTIES. See APPEAL, 2, 3, 20. LOGS AND TIMBER. MUNICIPAL CORPORATIONS, 14, 15. PLEADING, 5.

PARTNERSHIP: Admissions by one partner. See EVIDENCE, 3.

PAYMENT.

See CHATTEL MORTGAGES, 8. EVIDENCE, 2. LIENS, 4. PLEADING, 3, 6. TRIAL, 7.

If by express or tacit consent two parties agree to the entry upon a mutual account between them of a charge against one, and that one proceeds to make payments sufficient to cover that item and all preceding ones, it constitutes payment of that item, at least as against protest by any third person. *Nat. Cash Register Co. v. Bonneville,* 222

PEDDLERS. See MUNICIPAL CORPORATIONS, 9, 10.

PENSIONS. See POLICEMEN'S PENSION FUND.

PERPETUITIES.

1. Our statutes against perpetuities (secs. 2038, 2039, Stats. 1898) are applicable to grants and devises for charitable purposes. MARSHALL and SIEBECKER, JJ., dissent. *Danforth v. Oshkosh.* 262

2. Sec. 2039, Stats. 1898, permits suspension of the absolute power of alienation for a gross term not exceeding twenty-one years. *Ibid.*

3. Neither the statute nor the common law in this state prohibits perpetuities in personalty. *Ibid.*

4. The absolute power of alienation is not suspended, within the purview of the statute, when a trustee or other donee of the legal title is given authority to sell and convey complete title. *Ibid.*

5. Where, pursuant to a devise to trustees, land was conveyed by them to a city absolutely, to be used by it perpetually as a site for a public library, subject to a provision that if the land should cease to be so used it should revert to the heirs of the testatrix and the heirs of her deceased husband, there was no violation of the statutes against perpetuities:
(a) The use to which the land was to be devoted being a corporate one, both the legal title and the beneficial or equitable right was held by the city in its corporate capacity; hence no trust was created or imposed upon the city, and it took the title in fee.
(b) If the restraints upon the use or disposal of the property were limitations only, they were so repugnant to the grant as to be void.
(c) If a condition subsequent was imposed thereby, so that on breach thereof the fee would determine, the future estate in possession dependent upon such condition was so vested in the heirs named that the absolute power of alienation was not meanwhile suspended. *Ibid.*

6. MARSHALL and SIEBECKER, JJ., are further of the opinion that if the statutes against perpetuities are applicable to conveyances for charitable purposes, the express legislative authority to the city to maintain a public library and to take title to land for that purpose was a repeal *pro tanto* of such statutes or created an exception thereto. *Ibid.*

PHOTOGRAPHS. See EVIDENCE, 5.

PIERS AND WHARVES. See WATERS, 1, 2.

PLEADING.

Complaint: Cause of action pleaded: Determination. See LOGS AND TIMBER.

1. Where a complaint makes no attempt to state several separate causes of action, it must be construed as being intended to state some particular one of those which might arise out of the facts alleged; and when the intention of the pleader in that respect is ascertained, all other causes of action are excluded. *Grunert v. Brown,* 126

Answer: Failure to plead defenses. See DESCENT, 3. EXECUTORS, 3. INSURANCE, 2.

2. Where an estoppel *in pais* was not pleaded, although there was ample opportunity to do so, evidence to establish such an estoppel is inadmissible. *Wis. Farm Land Co. v. Bullard*, 320

3. In an action upon an undertaking to pay a judgment an answer alleging that defendant had no knowledge or information sufficient to form a belief as to whether the judgment or any part thereof has been paid or not, did not entitle defendant to the benefits of a plea of payment; and plaintiff was not bound to prove that the judgment had not been paid. *Wilkinson v. U. S. Fidelity & Guaranty Co.* 226

Counterclaim. See INSURANCE, 2.

Demurrer. See DESCENT, 3.

4. A demurrer upon the ground of want of legal capacity to sue reaches only personal disability, as infancy, coverture, idiocy and the like, or want of title to the character in which the plaintiff sues; as in case of an executor or administrator not having complied with the statutory requisites to his qualification, or an assignee not having fully qualified as such, and the like. It does not deal with the sufficiency of the complaint as to stating a cause of action in favor of the plaintiff. *McKenney v. Minahan*, 651

5. A demurrer for defect of parties plaintiff goes only to the subject of whether other persons should be brought in as such, not to the right of the one already in court. *Ibid.*

Amendment. See CRIMINAL LAW, 1, 4. GARNISHMENT, 1.

6. The propriety of permitting a pleading to be amended, long after issue joined and after death of a material witness, so as to withdraw an admission that a payment was made upon an indebtedness secured by chattel mortgage, is doubted, under the circumstances of this case. *Illinois T. & S. Bank v. Alex. Stewart L. Co.* 54

PLEDGES AND COLLATERAL SECURITY. See MORTGAGES, 1, 2.

POLICE POWER. See MUNICIPAL CORPORATIONS, 7, 9, 10.

POLICEMEN'S PENSION FUND.

Sec. 8, ch. 265, Laws of 1899, provides that if any policeman shall be injured while on duty and shall be "found, upon an examination by a medical officer ordered by said board [of trustees of policemen's pension fund], to be . . . permanently disabled by reason of service in such department," such board shall retire him from service, and upon such retirement shall order payment of a pension to him; but no such retirement shall occur unless the disability was contracted in the active service of the department. In a proceeding by *mandamus* to compel the board to order payment of a pension, it is *held* that the examination and finding of permanent disability by reason of service in the department are conditions precedent to the retirement, and that the provisions of the statute, being express limitations upon the power of the board, could not be waived by it, even though permanent disability of the relator be conceded. *State ex rel. Weber v. Trustees*, 436

POSSESSION of land. See ADVERSE POSSESSION. TAX TITLES, 3, 4.

POWER OF ALIENATION: Suspension. See PERPETUITIES.

PRACTICE. See ACTION. APPEAL. ASSIGNMENTS. COSTS. CRIMINAL LAW. EVIDENCE. GARNISHMENT, 1. INFANTS. JUDGMENT. JUSTICES' COURTS. LIENS, 1, 2, 6. LIMITATION OF ACTIONS. MORTGAGES, 3. PLEADING. REPLEVIN. SPECIAL PROCEEDINGS. TRIAL. WITNESSES.

PRESUMPTIONS. See ADVERSE POSSESSION, 1. CONSTITUTIONAL LAW, 4. DESCENT, 4. INSURANCE, 11. MUNICIPAL CORPORATIONS, 12. WILLS, 3, 4.

PRINCIPAL AND AGENT.

See INSURANCE, 6, 7. LANDLORD AND TENANT. MALICIOUS PROSECUTION, 1, 6, 7. MASTER AND SERVANT, 9–15. NEGLIGENCE, 5.

Where plaintiff's wife was his agent to collect moneys, but was not shown to have, or to have ever assumed, any broader authority, plaintiff was not bound by her statement, on receiving a partial payment for the digging of a well, that her husband would make the well all right. *Butler v. Davis,* 166

PRINCIPAL AND SURETY.

See ASSIGNMENTS. GARNISHMENT, 2. GUARDIAN AND WARD, 1, 2.

In an action upon an undertaking to pay a judgment it is no defense that the undertaking was procured by fraud of the judgment debtor, if the plaintiff had no knowledge and was not chargeable with notice of the fraud. *Wilkinson v. U. S. Fidelity & Guaranty Co.* 226

PRIVILEGED COMMUNICATIONS. See WITNESSES, 2.

PROBATE of wills. See WILLS, 7–9.

PROFITS, Loss of. See DAMAGES, 1.

PROXIMATE CAUSE. See MASTER AND SERVANT, 7, 8. RAILROADS, 7, 10, 11. TELEGRAPH COMPANIES.

PUBLIC IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 6–8.

PUBLIC LIBRARIES. See PERPETUITIES, 5, 6.

PUBLIC POLICY. See RAILROADS, 3.

PUBLIC SCHOOLS. See TAXATION, 4–8.

PUNITORY DAMAGES. See DAMAGES, 2, 3. MALICIOUS PROSECUTION, 7.

RAILROADS.

Location: Conveyance of right of way: Spur tracks: Obligation to maintain.

1. A conveyance to a railway company of a right of way "as now located, to the terminus of the road," on, over, and along certain land, may be construed as conveying no title beyond the point on said land to which the right of way had been legally located by surveying and staking out the center line thereof for the purpose of constructing and operating the road, as required by sec. 1846, Stats. 1898, even though, for the convenience of the grantor, the company had, before such conveyance, extended, or permitted the grantor to extend, a spur track beyond the terminus to which the right of way had been so legally located. *Schneider v. Knickerbocker Ice Co.* 171

2. Where in such a case the grantee company afterwards removed a part of said extension of the spur track, as being upon a strip

of land not acquired by it for right of way purposes, and its successor in title makes no claim to such strip, but acquiesces in the owner's claim that there is no right of way over it, the owner of a warehouse on an adjoining tract has no right under sec. 1802, Stats. 1898, to build or maintain a track over such strip to connect his warehouse with the spur track. *Ibid.*

Vacation of streets. See MUNICIPAL CORPORATIONS, 11.

Crossing of tracks by street railway: Flagman. See STREET RAILWAYS, 1-3.

Injury to yardmaster switching cars. See NEGLIGENCE, 7-9.

Injury to express messenger: Contract exempting from liability.

3. A contract exempting a railway company from liability to an express messenger for personal injuries sustained by him, while riding on its trains in performance of his duty, by reason of the ordinary negligence of the railway employees, is not against public policy and is valid. *Peterson v. C. & N. W. R. Co.* 197

4. An agreement by an express messenger, made upon entering the employment of an express company, to exempt said company and the transportation companies with which it dealt from all liability for personal injuries whether arising from negligence or otherwise, and that this stipulation should inure to the benefit of all such transportation companies as fully as if made directly with them, is a bar to a recovery by him against a railway company for injuries caused by the negligence of its employees while he was riding on its train in the performance of his duty as such messenger, whether the railway company knew of or assented to such agreement before the commencement of the action or not. *Ibid.*

Killing of child at street crossing: Unlawful speed: Contributory negligence.

5. In an action against a railway company for the killing of a child at a street crossing, where it appeared, among other things, that the engineer was on the lookout on his side of the train all the time as it approached the crossing, but by reason of a curve could not see the other side of the track whence the child was coming, the mere fact that just before reaching that street the fireman, in performing his duties, got into a position where he could not look ahead, cannot be regarded as negligence. *O'Brien v. Wis. Cent. R. Co.* 7

6. Secs. 1809, 1809*a*, Stats. 1898, construed together, make it unlawful to run trains faster than six miles an hour over street crossings in a city, except where gates are maintained as provided in the latter section. *Ibid.*

7. Whether, in this case, the unlawful speed of a train was the proximate cause of the killing of a child at a street crossing, is *held* to have been a question for the jury. *Ibid.*

8. Plaintiff's child, twenty-five months old, left him while he was splitting wood back of his house, went out through the front gate upon the sidewalk, thence a short distance across defendant's railway track, and then started to return. Plaintiff missed the child, looked for him in front of the house, and saw him coming back on the sidewalk toward the track. He started on the run, but before he could reach the track defendant's train

any considerable expense in reliance upon the attempted vacation, it is *held* that the city is not estopped to claim that the streets had not been vacated. *Ashland v. C. & N. W. R. Co.* 105 Wis. 398, followed. MARSHALL, J., and CASSODAY, C. J., dissent, being of the opinion that in view of all the circumstances (including the undisturbed occupancy of the streets by the railway companies for more than ten years, positive acts of encouragement on the part of the city to continue such occupancy, the expenditure of large sums by the railway companies in improvements, and the final creation of a situation from which they cannot recede without great loss) the city should be held estopped. *Ashland v. N. P. R. Co.* 204

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Negligent delay in delivering telegram. See TELEGRAPH COMPANIES.

Admissions as to cause of accident. See EVIDENCE, 3.

NEW TRIAL. See APPEAL, 14–17. JUDGMENT, 3.

NONSUIT. See JUDGMENT, 1, 4. NEGLIGENCE, 2, 3.

NOTICE.
Of issue. See GARNISHMENT, 1.
Of claim for lien. See LIENS, 6.
Of claim for injury. See LIMITATION OF ACTIONS.
Of fraud. See PRINCIPAL AND SURETY.

NUISANCE. See WATERS, 1, 2.

OFFICERS.

Appointment: Civil service rules: Deputies of bonded officer.

1. The official bond of a city clerk, general in its terms, covering, as required by law, all the administrative duties of his office, includes all acts of his deputies and assistants within the scope of their authority; and such assistants are therefore within the exemption clause of a city service act (sec. 6, ch. 313, Laws of 1895) which provides that officers and clerks, for the faithful discharge of whose duties a superior officer is required to give bond, shall not be affected by the rules of the city service commissioners as to their election, selection, or appointment. *Butler v. Milwaukee,* 526

Election: Holding over: De facto officers: Justices of the peace.

2. M. and H. were duly elected and qualified as justices of the peace, for the term of two years and until their successors should be elected and qualify. They were the only justices in the town, although it was entitled to four. At the next election H. was re-elected and three new justices were elected, none of them being designated on the ballots as the successor of M. One of the three new justices, whose residence was nearest to M., failed to qualify; and M., claiming for that reason to be entitled to hold over under his previous election, continued to act as a justice. *Held,* that he was a justice *de facto,* whose right to the office could not be questioned in a mere collateral proceeding. *Deuster v. Zillmer,* 402

Clerks of courts: Filing papers. See LIENS, 1, 2.

Clerks of cities, towns, etc. See TAXATION, 4.

City treasurer. See TAXATION, 8.

Municipal officers: Fraud: Collusive judgment. See MUNICIPAL CORPORATIONS, 14–16.

School district officers. See MUNICIPAL CORPORATIONS, 14–16.

Officers of corporations. See CORPORATIONS, 2–8.

OFFICIAL BONDS. See ASSIGNMENTS, 1. OFFICERS, 1.

ORDINANCES. See MUNICIPAL CORPORATIONS, 1–4, 9–11.

PARENT AND CHILD. See RAILROADS, 8.

PAROL EVIDENCE affecting writings. See EVIDENCE, 6. MORTGAGES, 1, 2.

PARTIES. See APPEAL, 2, 3, 20. LOGS AND TIMBER. MUNICIPAL CORPORATIONS, 14, 15. PLEADING, 5.

PARTNERSHIP: Admissions by one partner. See EVIDENCE, 3.

PAYMENT.

See CHATTEL MORTGAGES, 8. EVIDENCE, 2. LIENS, 4. PLEADING, 3, 6. TRIAL, 7.

If by express or tacit consent two parties agree to the entry upon a mutual account between them of a charge against one, and that one proceeds to make payments sufficient to cover that item and all preceding ones, it constitutes payment of that item, at least as against protest by any third person. *Nat. Cash Register Co. v. Bonneville,* 222

PEDDLERS. See MUNICIPAL CORPORATIONS, 9, 10.

PENSIONS. See POLICEMEN'S PENSION FUND.

PERPETUITIES.

1. Our statutes against perpetuities (secs. 2038, 2039, Stats. 1898) are applicable to grants and devises for charitable purposes. MARSHALL and SIEBECKER, JJ., dissent. *Danforth v. Oshkosh.* 262

2. Sec. 2039, Stats. 1898, permits suspension of the absolute power of alienation for a gross term not exceeding twenty-one years. *Ibid.*

3. Neither the statute nor the common law in this state prohibits perpetuities in personalty. *Ibid.*

4. The absolute power of alienation is not suspended, within the purview of the statute, when a trustee or other donee of the legal title is given authority to sell and convey complete title. *Ibid.*

5. Where, pursuant to a devise to trustees, land was conveyed by them to a city absolutely, to be used by it perpetually as a site for a public library, subject to a provision that if the land should cease to be so used it should revert to the heirs of the testatrix and the heirs of her deceased husband, there was no violation of the statutes against perpetuities:
   (a) The use to which the land was to be devoted being a corporate one, both the legal title and the beneficial or equitable right was held by the city in its corporate capacity; hence no trust was created or imposed upon the city, and it took the title in fee.
   (b) If the restraints upon the use or disposal of the property were limitations only, they were so repugnant to the grant as to be void.
   (c) If a condition subsequent was imposed thereby, so that on breach thereof the fee would determine, the future estate in possession dependent upon such condition was so vested in the heirs named that the absolute power of alienation was not meanwhile suspended. *Ibid.*

6. MARSHALL and SIEBECKER, JJ., are further of the opinion that if the statutes against perpetuities are applicable to conveyances for charitable purposes, the express legislative authority to the city to maintain a public library and to take title to land for that purpose was a repeal *pro tanto* of such statutes or created an exception thereto. *Ibid.*

PHOTOGRAPHS. See EVIDENCE, 5.

PIERS AND WHARVES. See WATERS, 1, 2.

PLEADING.

Complaint: Cause of action pleaded: Determination. See LOGS AND TIMBER.

1. Where a complaint makes no attempt to state several separate causes of action, it must be construed as being intended to state some particular one of those which might arise out of the facts alleged; and when the intention of the pleader in that respect is ascertained, all other causes of action are excluded. *Grunert v. Brown,* 126

Answer: Failure to plead defenses. See DESCENT, 3. EXECUTORS, 3. INSURANCE, 2.

2. Where an estoppel *in pais* was not pleaded, although there was ample opportunity to do so, evidence to establish such an estoppel is inadmissible. *Wis. Farm Land Co. v. Bullard*, 320

3. In an action upon an undertaking to pay a judgment an answer alleging that defendant had no knowledge or information sufficient to form a belief as to whether the judgment or any part thereof has been paid or not, did not entitle defendant to the benefits of a plea of payment; and plaintiff was not bound to prove that the judgment had not been paid. *Wilkinson v. U. S. Fidelity & Guaranty Co.* 226

Counterclaim. See INSURANCE, 2.

Demurrer. See DESCENT, 3.

4. A demurrer upon the ground of want of legal capacity to sue reaches only personal disability, as infancy, coverture, idiocy and the like, or want of title to the character in which the plaintiff sues; as in case of an executor or administrator not having complied with the statutory requisites to his qualification, or an assignee not having fully qualified as such, and the like. It does not deal with the sufficiency of the complaint as to stating a cause of action in favor of the plaintiff. *McKenney v. Minahan*, 651

5. A demurrer for defect of parties plaintiff goes only to the subject of whether other persons should be brought in as such, not to the right of the one already in court. *Ibid.*

Amendment. See CRIMINAL LAW, 1, 4. GARNISHMENT, 1.

6. The propriety of permitting a pleading to be amended, long after issue joined and after death of a material witness, so as to withdraw an admission that a payment was made upon an indebtedness secured by chattel mortgage, is doubted, under the circumstances of this case. *Illinois T. & S. Bank v. Alex. Stewart L. Co.* 54

PLEDGES AND COLLATERAL SECURITY. See MORTGAGES, 1, 2.

POLICE POWER. See MUNICIPAL CORPORATIONS, 7, 9, 10.

POLICEMEN'S PENSION FUND.

Sec. 8, ch. 265, Laws of 1899, provides that if any policeman shall be injured while on duty and shall be "found, upon an examination by a medical officer ordered by said board [of trustees of policemen's pension fund], to be . . . permanently disabled by reason of service in such department," such board shall retire him from service, and upon such retirement shall order payment of a pension to him; but no such retirement shall occur unless the disability was contracted in the active service of the department. In a proceeding by *mandamus* to compel the board to order payment of a pension, it is *held* that the examination and finding of permanent disability by reason of service in the department are conditions precedent to the retirement, and that the provisions of the statute, being express limitations upon the power of the board, could not be waived by it, even though permanent disability of the relator be conceded. *State ex rel. Weber v. Trustees*, 436

POSSESSION of land. See ADVERSE POSSESSION. TAX TITLES, 3, 4.

POWER OF ALIENATION: Suspension. See PERPETUITIES.

to exempt all property which, if it were not for the license fee system, would be directly taxable to the street railway company. *Ibid.*

School taxes: Levy by county board: Duty of city treasurer.

4. The word "town" in sec. 1074, Stats. 1898 (providing that the county board may determine "the amount to be raised by tax in each town for the support of common schools therein," etc.), should be construed, under subd. 17, sec. 4971, in the broad sense of taxing district, whether town, city, or village; and the words "town clerk" in sec. 1079 include clerks in cities and villages as well. *State ex rel. Board of Education v. Hunter,* 450

5. The determination by the county board, pursuant to sec. 1074, Stats. 1898, of an amount to be raised by tax in a city or other taxing district for the support of schools therein, is a levy of the tax, since the statutes (secs. 1076, 1079) leave nothing to be done thereafter to raise the amount, except the performance of purely ministerial duties. *Ibid.*

6. Such tax, though levied by the county board, is not a tax for county purposes, to be accounted for to the county treasurer, but is a town, city, or village tax, as the case may be; and its character is not altered by a misdescription of it in the warrant for its collection or by any other mistake in treating it as levied for county purposes. *Ibid.*

7. Sec. 554, Stats. 1898, providing that the state superintendent shall withhold that portion of the state school fund which would otherwise go to any particular subdivision of the state if such subdivision shall have failed to raise by tax a school fund "as determined by the county board in pursuance of sec. 1074," does not indicate a legislative intention that such determination of the county board should merely create a condition precedent, to be satisfied by the power to levy taxes lodged in the taxing district, but was intended to secure the actual placing of the required sum to the credit of the school board in the taxing district, authority being given to supply any deficiency by transfer from the general funds of the district. *Ibid.*

8. Under sec. 111 of the Superior city charter (ch. 124, Laws of 1891), making it the duty of the city treasurer, after payment of the state taxes, to set aside all sums of money levied for school purposes, no distinction is to be made between taxes levied by the board of education and the school tax levied by the county board pursuant to sec. 1074, Stats. 1898. *Ibid.*

Taxes levied, when may be offset against indebtedness of municipality. See CONSTITUTIONAL LAW, 1.

Special assessments. See MUNICIPAL CORPORATIONS, 6–8.

Sales for taxes. See TAX TITLES.

TAXATION OF COSTS. See COSTS.

TAXPAYERS' ACTION. See MUNICIPAL CORPORATIONS, 14–16.

TAX TITLES.

See WILLS, 10.

1. A tax deed reciting in one place that the lands were sold to the grantee, and in another that the certificates were assigned to

him, fails to state the name of the purchaser at the tax sale, and is void on its face. *Dunbar v. Lindsay*, 239

2. Under sec. 1189*a*, Stats. 1898, as amended by sec. 21, ch. 351, Laws of 1899, the limitation therein prescribed for actions of ejectment as to lands conveyed by tax deed void on its face, is not applicable unless the original owner or those claiming under him has failed to pay or redeem all the taxes levied upon such lands after those for the nonpayment of which the deed was issued, up to the time of the recording of the deed. *Ibid.*

3. Where in ejectment for land sold for taxes the complaint alleges that defendant is in possession of the premises and the answer states that defendant has been in undisputed and continuous possession since the recording of his tax deed, evidence that the lands were at all times vacant and unoccupied was inadmissible against objection. *Ibid.*

4. Ejectment may be maintained by the original owner against one claiming under a void tax deed, although the land is vacant and the claimant has not had actual possession. *Cutler v. Hurlbut*, 29 Wis. 152, explained. *Ibid.*

TELEGRAPH COMPANIES.

1. Under sec. 1778, Stats. 1898 (making telegraph companies "liable for all damages occasioned by the failure or negligence" of their employees in receiving, copying, transmitting, or delivering messages), the damages recoverable are such only as are the proximate result of the company's breach of duty. *Fisher v. W. U. Tel. Co.* 146

2. Damages so proximately resulting from breach of the company's duty in the cases mentioned in the statute are recoverable, even though the action is upon contract, without showing that the company was chargeable with knowledge that such results were likely to follow from its conduct. *Ibid.*

[3. Whether the addressee of a telegram, the sender not being his agent nor making a contract for his benefit, must sue, if at all, for breach of duty constituting actionable negligence, not determined.] *Ibid.*

4. Negligent delay in delivering a telegram which merely rejected plaintiffs' offer to buy goods on certain terms did not entitle them to recover damages on account of their failure to make the purchase on other terms, as they might or would have done had the telegram been seasonably delivered. Such damages are not the proximate result of the company's breach of duty. *Ibid.*

TENANCY BY ENTIRETIES. See HUSBAND AND WIFE.

TESTAMENTARY TRUSTS. See TRUSTS, 1-3.

TITLE.

Of proceeding. See SPECIAL PROCEEDINGS.

To land. See ADVERSE POSSESSION. COMPROMISE. CONTRACTS, 1. DEEDS. HUSBAND AND WIFE. LANDLORD AND TENANT. MARRIED WOMEN, 8. MORTGAGES. PERPETUITIES. RAILROADS, 1, 2. STREET RAILWAYS, 3. TAXATION, 3. TAX TITLES. TRUSTS, 4. WATERS, 1, 5. WILLS, 8-13.

To personalty. See CHATTEL MORTGAGES. DESCENT. PERPETUITIES, 3. REPLEVIN. TRUSTS, 4.

TONTINE PERIOD, when completed. See INSURANCE, 8.

TONTINE SURPLUS. See INSURANCE, 8–12.

TORTS of servant: Liability of employer. See MASTER AND SERVANT, 9–15.

TOWNS. See HIGHWAYS. MUNICIPAL CORPORATIONS, 14–16. TAXATION, 4–7.

TRADEMARKS AND TRADENAMES.

1. Defendant's trade symbol or device is *held* to be an imitation, calculated to deceive, of that which plaintiff had previously used upon its cars, sacks, cards, billheads, and advertising matter, and under which plaintiff had built up a profitable business in the manufacture and sale of malt made by the so-called "eight-day process"—the striking features of both devices being their circular shape, a large figure 8, and encircling heads of barley, although there were differences in coloring and in the words attached; and the use of such device by defendant constitutes unfair competition in trade, against which equity will protect the plaintiff. *Manitowoc Malting Co. v. Milwaukee Malting Co.* 543

2. The facts that such malt is not retailed to the public, but sold only to brewers and distillers, and that the defendant has not used its device upon cars or sacks, but only upon sample cans, cards, letterheads, etc., go only to the degree of deception and consequent injury, but do not affect plaintiff's right to protection. *Ibid.*

3. In an action to restrain the use of such trade device, if the fact is established of an imitation well calculated to deceive, it is not necessary to show by specific proof that purchasers have actually been deceived. *Ibid.*

TRANSACTIONS WITH DECEDENTS. See WITNESSES, 1.

TRESPASS. See LOGS AND TIMBER.

TRIAL.

Bringing action to trial: Dismissal for failure. See ACTION, 1, 2.

Examination of witnesses, etc. See EVIDENCE, 2. WITNESSES.

Conduct of attorneys. See ASSAULT, 3.

Taking case or question from jury. See ADVERSE POSSESSION, 3, 4. APPEAL, 14. MALICIOUS PROSECUTION, 4. MASTER AND SERVANT, 5, 7, 15. NEGLIGENCE, 2, 3, 7. RAILROADS, 7–9. STREET RAILWAYS, 4, 7. WATERS, 3.

1. Although both parties move for the direction of a verdict they do not thereby waive the right to have the facts passed upon by the jury. *Nat. Cash Register Co. v. Bonneville,* 222

Instructions to jury. See APPEAL, 4. CRIMINAL LAW, 2, 3. DAMAGES, 2. MALICIOUS PROSECUTION, 3, 6, 7. MASTER AND SERVANT, 11, 12. NEGLIGENCE, 10.

2. Instructions, to be helpful to a jury, should not merely state the law in general terms, but should specifically apply it to the facts of the case as the jury may find them to be. *Cobb v. Simon,* 597

3. The jury may properly be instructed that if they believe that a witness has wilfully and knowingly sworn falsely as to any

material matter in issue they are at liberty to disregard his entire testimony, except so far as corroborated by other credible evidence. *Richardson v. Babcock,* 141

4. If an instruction to the jury is so worded that it may reasonably receive two different interpretations, one correct and one incorrect, it must be held erroneous and prejudicial. *Ibid.*

5. An instruction to the effect that the jury are not bound to believe everything a witness testifies to, provided they believe that he is mistaken or has wilfully falsified as to one matter, is criticised. *Ibid.*

6. In a colloquy between court and counsel at the close of the charge, the court assented to the proposition that plaintiff must recover, if at all, upon the preponderance of evidence, and further instructed the jury that the burden of proof was upon plaintiff to establish the contract sued on as he claimed it to be, by the weight of the testimony. *Held,* not erroneous, in the absence of a request for more specific instructions. *Ibid.*

7. An instruction that it was incumbent upon defendant to establish his defense of payment "by clear and satisfactory evidence" was erroneous and presumably prejudicial, although the court had already correctly charged that the burden was upon him to show payment "by a fair preponderance of the evidence." *Meyer v. Hafemeister,* 539

Verdict. See APPEAL, 9. BROKERS. REPLEVIN.

8. A special verdict is sufficient if it covers all the facts put in issue by the pleadings in respect to which the evidence is conflicting. *Wis. Farm Land Co. v. Bullard,* 320

9. Where the questions submitted for a special verdict covered all the material issues of fact, the refusal to submit other questions was not error. *Boyce v. Wilbur Lumber Co.* 642

Setting aside or changing verdict. See APPEAL, 10, 14.

10. To justify a court in changing an affirmative answer by the jury to a negative one, such affirmative answer must be contrary to the undisputed credible evidence. *Blohowak v. Grochoski,* 189

Judgment notwithstanding verdict. See APPEAL, 15.

Trial by court: Findings. See COSTS, 2.

Correction of mistakes, etc. See JUDGMENT, 1.

TRIAL of member of corporation, on charges. See CORPORATIONS, 4–8.

TROVER AND CONVERSION. See CHATTEL MORTGAGES, 5–8. LOGS AND TIMBER. WATERS, 2.

TRUSTS AND TRUSTEES.

See CONTRACTS, 1. PERPETUITIES.

Testamentary trusts: Appointment of trustees.

1. In the appointment of trustees under sec. 4027, Stats. 1898, the discretion of the county court is not an arbitrary one, but is to be exercised in such a way as to secure, not merely competent men of integrity, but men who will co-operate harmoniously in the execution of the trust; and effect should be given to the intention of the testator in respect to the persons to be selected, where such intention is expressly declared or

is fairly deducible from the language of the will. *Cole v. Watertown,* 133

2. Thus, where the will provided that in case any of the trustees therein named should die or refuse to accept the trust the county court should be requested to fill the vacancy by appointment, "subject to the approval of the parties interested in" the estate, the court was not justified in appointing a person against the objection and protest of a son of the testator who was one of the executors and trustees named in the will. *Ibid.*

3. The intention of the testator should have been regarded in such case, whether the vacancy to be filled was caused by the death or refusal of one of the trustees originally named, or by the death or resignation of a later appointee. *Ibid.*

Resulting trusts: Husband and wife.

4. Where, for debts owing to himself, a husband knowingly takes notes and mortgages in his wife's name, the title thereto vests in her, under sec. 2077, Stats. 1898. *Meier v. Bell,* 482

UNDERTAKING to pay judgment. See GARNISHMENT, 2. PRINCIPAL AND SURETY.

UNDUE INFLUENCE. See WILLS, 1, 2.

UNFAIR COMPETITION. See TRADEMARKS.

UNREASONABLENESS of ordinance, etc. See MUNICIPAL CORPORATIONS, 1–4.

USAGE. See NEGLIGENCE, 8, 9.

VACANCIES: Testamentary trustees. See TRUSTS, 1–3.

VACATION of streets. See MUNICIPAL CORPORATIONS, 11.

VENDOR AND PURCHASER OF LAND. See BROKERS. RAILROADS, 1.

VERDICT. See APPEAL, 9, 10, 14, 15. BROKERS. REPLEVIN. TRIAL, 8–10.

VESTED ESTATES. See PERPETUITIES, 5.

VILLAGES. See MUNICIPAL CORPORATIONS, 1–3. TAXATION, 4–7.

VOLUNTARY APPEARANCE. See JUSTICES' COURTS, 1.

VOLUNTARY ASSIGNMENT. See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

VOLUNTARY OBLIGATION. See GUARDIAN AND WARD, 1, 2.

WAIVER.
Of objections. See APPEAL, 5.
Of right to revoke settlement. See COMPROMISE.
Of irregularity in call. See CORPORATIONS, 2.
Of defects in pleading. See DESCENT, 3.
Of forfeitures. See INSURANCE, 4, 7.
Of lien. See LIENS, 4.
Of remedy: Election. See MASTER AND SERVANT, 3.
Of finding of disability. See POLICEMEN'S PENSION FUND.
Of right to verdict of jury. See TRIAL, 1.

WANT OF PROSECUTION: Dismissal. See ACTION, 1.

WARRANTY. See INSURANCE, 2.

WATERS.

Inland lakes: Riparian rights.

1. A riparian owner on an inland navigable lake has the exclusive right to build piers and wharves in front of his land in aid

of navigation, and may remove, as a private nuisance, a pier erected there by another person. *McCarthy v. Murphy*, 159

2. Where riparian owners on a lake, after carefully removing a pier built by another person in front of their land, placed the material on the shore, and the builder of the pier afterwards took possession thereof, there was no actionable conversion of such material by said riparian owners. *Ibid.*

Watercourses: What are.

3. The evidence in this case (stated in the opinion) tending to show the existence of a natural watercourse over the plaintiff's land and upon that of the defendant, is *held* sufficient to make the question one for the jury. *Blohowak v. Grochoski*, 189

4. A stream does not cease to be a watercourse because at a certain point it spreads out and flows for a distance over level land without defined banks before flowing again in a definite channel. *Ibid.*

Navigable rivers: Harbors: Riparian rights.

5. Where an artificial navigable channel has been made by the straightening of a portion of a river constituting a harbor, the abutting owners and the public have the same rights in respect thereto as if such channel were a natural watercourse. *Lathrop v. Racine*, 461

Same: Improvement: Special assessments. See MUNICIPAL CORPORATIONS, 6–8.

WELLS: Drilling: Implied agreements. See CONTRACTS, 3.

WILLS.

See EXECUTORS. TRUSTS, 1–3.

Testamentary capacity: Undue influence.

1. The evidence in this case (stated in the opinion) is *held* to sustain findings of the trial court that a will was duly executed, and that the testator at the time was of sufficient mental capacity and free from undue influence. *Hanley v. Kraftczyk*, 352

2. Same points. *Gavitt v. Moulton*, 35

Lost or destroyed wills: Presumption as to revocation: Evidence.

3. Where a will was last known to be in the possession of the testator and cannot be found upon his death, the presumption is that he destroyed it with the intention of revoking it. *Gavitt v. Moulton*, 35

4. The mere fact that the contestant in such case had an opportunity to destroy the will is not, of itself, sufficient to overcome the presumption that the testator destroyed it with intent to revoke it, but it is a circumstance to be considered with other proof. *Ibid.*

5. Declarations of the testator showing that he believed he had possession of his will up to a time shortly before his death are admissible as tending to show that the will had been lost by accident or destroyed by the design of others. *Ibid.*

6. The evidence in this case is *held* to sustain a finding to the effect that the will had been lost by accident or destroyed by design of some person other than the testator. *Ibid.*

Probate: Delay: Failure to act on prior petition.

7. Failure of the county court to act upon a petition for the probate of a will does not bar a subsequent application for probate. *Hanley v. Kraftczyk,* 352

8. Lapse of time is no bar to proceedings for probate of a will in order to establish title to real estate. *Ibid.*

Same: Who may apply: Title to land.

9. One claiming title by deed from the devisee of land has a right to apply for probate of the will. *Ibid.*

10. One to whom land has been conveyed by the devisee and her husband is not estopped from claiming title under the will and such conveyance by the fact that the husband had, prior to the conveyance, obtained a tax deed of the land. *Ibid.*

Construction: Mistake in description of land.

11. A devise of land described it as being in section 21 and bounded on one side by a certain railroad and on another by lands of certain persons. There was no land in section 21 so bounded; the testator never owned or occupied any land in that section; and the description was otherwise so indefinite and uncertain as not to apply to any specific land in that section. The testator did, however, own and occupy, at the time of his death, land in section 22, answering in all other respects to the description in the will. *Held,* that evidence of these facts was admissible and sustained a finding construing the will as devising the land in section 22. *Hanley v. Kraftczyk,* 352

Homestead: When debts and legacies a charge thereon.

12. A provision in a will, "After my just debts and funeral expenses have been paid, I give," etc., does not, under sec. 3862, Stats. 1898, make such debts a charge upon testator's homestead therein devised. *Kuener v. Prohl,* 487

13. A will gave testator's household goods and $1,000 to one of his two sons, and directed that the rest of his property, real and personal, be divided equally between them. *Held,* that such legacy of $1,000 was a charge upon all the testator's estate, including, if necessary, his homestead, and that a mortgage given by the other son on his interest in the homestead covered only one half of the proceeds thereof remaining after payment of said legacy. *Ibid.*

WITNESSES.

Competency: Transactions with agent since deceased.

1. Under sec. 4070, Stats. 1898, defendant was not competent to testify as to transactions between himself and plaintiff's attorney, since deceased, where plaintiff had offered no evidence concerning such transactions. *Meyer v. Hafemeister,* 539

Same: Privileged communications: Attorney and client.

2. An employee having been arrested and prosecuted criminally for an assault upon one of his employer's customers, the employer called upon the assistant district attorney with reference to the matter. Afterwards, in an action by the injured

person against the employer, said attorney was permitted to testify that in that conversation with the employer he stated to the latter the plaintiff's version of the transaction. *Held*, not error. The relation of attorney and client did not exist between the employer and the prosecuting attorney, and hence the communication testified to was not privileged. *Cobb v. Simon*, 597

Examination. See CRIMINAL LAW, 5. EVIDENCE, 2.

Credibility, impeachment, etc. See TRIAL, 3, 5.

3. It is never admissible to impeach a witness by showing contradictory statements out of court, having no relevancy to any of the issues. *Barton v. Bruley*, 326

4. The fact that a witness is married to the daughter of a party, if it may be shown as bearing upon his interest and impartiality, must be proved by direct evidence and not by mere hearsay or admissions of persons not parties to the action. *Ibid.*

5. On a trial for assault it was proper to refuse to permit the complaining witness to be cross-examined as to whether at one time he ran a sporting house and was still in that business, such questions having no relevancy to the issue. *Meehan v. State*, 621

WORDS AND PHRASES.

Attachment, in statute. See INFANTS, 2.
Authorized, in instruction to jury. See DAMAGES, 2.
Damages occasioned by failure, etc., in statute. See TELEGRAPH COMPANIES, 1.
Debt owing, in statute. See INSURANCE, 9, 10.
Defect of parties plaintiff, in statute. See PLEADING, 5.
Filed, in statute. See LIENS, 1, 2.
Legal capacity to sue, in statute. See PLEADING, 4.
Levy of tax, in statute. See TAXATION, 5.
Located, in deed. See RAILROADS, 1.
Mental incompetency, in statute. See GUARDIAN AND WARD, 6, 7.
Notice in writing, in statute. See LIENS, 6.
Official bond, in statute. See ASSIGNMENTS, 1.
Owned, in statute. See TAXATION, 2, 3.
Party aggrieved, in statute. See APPEAL, 2, 20.
Probable cause. See MALICIOUS PROSECUTION, 3.
Procuring cause of sale, in verdict. See BROKERS.
Proximately. See NEGLIGENCE, 10.
Reasonable time. See CONTRACTS, 2.
Religious test, in constitution. See INSURANCE, 15.
Rights of conscience, in constitution. See INSURANCE, 15.
Survivors. See INSURANCE, 16.
Town and *town clerk*, in statute. See TAXATION, 4.
Transient merchant, etc., in ordinance. See MUNICIPAL CORPORATIONS, 9, 10.
Watercourse. See WATERS, 4.
Working day, in contract. See MASTER AND SERVANT, 2.

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